Supreme Court, U.S.
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In The

Supreme Court of the United States

RAY STOVALL AND PHYLLIX STOVALL,

Petitioners,

v.

CITY OF STREETSBORO,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals,
Eleventh Appellate District, Portage County, Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the refusal of the state supreme court to review and set aside a judgment in favor of the City that disposed of the Petitioners' discrimination-based defense of the City's claim was a violation of the Due Process Clause or the First Amendment right to petition for a redress of grievances where, unknown to the Petitioners, they were represented in the case by an individual who was not a licensed attorney, but a fraudulent imposter who had been convicted of 44 felony counts of unauthorized practice of law?

LIST OF PARTIES TO THE PROCEEDING

Petitioners in this case are Ray Stovall and Phyllix Stovall, an American Indian and African-American married couple who reside in Ohio. Respondent in this case is the City of Streetsboro, Ohio ("the City"), which was the Plaintiff-Appellee in the proceeding in the court whose judgment is sought to be reviewed. The other parties who participated in the state court proceedings are The Drees Co., an Ohio Corporation, Encore Homes, an Ohio Corporation, Michael Utz and Jean Utz, individuals, Rodney L. Barriker and Thelma Barriker, individuals, Jerry Colbourne, an individual, and J&S Construction Co., an Ohio Corporation.

This petition is not being submitted by or on behalf of any corporation, and there is no parent or subsidiary company to be listed by the petitioners.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Ray Stovall and Phyllix Stovall ("the Stovalls") respectfully petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of Ohio in this case.

OPINIONS BELOW

Supreme Court of Ohio Case No. 03-1008

Final judgment entry of Ohio Supreme Court, dated September 10, 2003 (declining jurisdiction and dismissing Petitioner's appeal of April 28, 2003 decision of Court of Appeals as "not involving any substantial constitutional question").

Court of Appeals [Ohio], Eleventh Appellate District, Case No. 2002-P-0018

Opinion of Portage County Court of Appeals, dated April 28, 2003 (*City of Streetsboro v. Encore Homes*, 2003 Ohio 2109, 2003 Ohio App. LEXIS 1981) (affirming decision of the Portage County Common Pleas Court dated January 31, 2002 that denied Petitioners' motion to vacate July 28, 2000 judgment entry); Judgment Entry of Portage County Court of Appeals, dated April 28, 2003 (same).

Common Pleas Court [Ohio] Case No. 99 CV 0532

Order and Journal Entry of Portage County Common Pleas Court, dated January 31, 2002 (denying Petitioners' motion to vacate July 28, 2000 judgment of Portage County Common Pleas Court).

Court of Appeals [Ohio], Eleventh Appellate District, Case No. 2002-P-0018

Judgment Entry of Portage County Court of Appeals, dated Sept. 24, 2001; Opinion of Portage County Court of Appeals, dated Sept. 24, 2001 (affirming

judgment of Common Pleas Court dated July 28, 2000 that granted Respondent's motion for summary judgment); Judgment Entry of Portage County Court of Appeals, dated August 22, 2001 (directing Petitioners to notify Court of Appeals within twenty days if they will hire new attorney or proceed pro se with materials previously submitted).

Common Pleas Court [Ohio] Case No. 99 CV 0532

Judgment Entry of Portage County, Ohio, Common Pleas Court, dated July 28, 2000 (granting Respondent's motion for summary judgment on its claim for permanent and mandatory injunction against Petitioners).

STATEMENT OF JURISDICTION

The final judgment of the Ohio Supreme Court was entered on September 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

> citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Stovalls innocently placed their trust and the representation of their precious constitutional rights in the hands of an imposter. In April, 2000, the Stovalls engaged an individual, Bruce Brown, to represent them at the trial court level. Mr. Brown misrepresented himself as an experienced attorney licensed to practice in Ohio and New York. In fact, Bruce Brown was at the time disbarred in the State of New York, had never been admitted or licensed to practice in the State of Ohio, and was engaged in conduct constituting the unlawful practice of law. *See State of Ohio v. Brown*, 108 Ohio App.3d 489, 671 N.E.2d 280 (1995), *appeal not allowed*, 75 Ohio St. 3d 1484, 664 N.E.2d 536 (1996) (affirming conviction of Bruce A. Brown of forty-four felony charges in connection with his holding himself out to be a licensed attorney, despite disbarment in New York and never being licensed to practice in Ohio). *See also Disciplinary Counsel v. Brown*, 99 Ohio St. 3d 114, 789 N.E.2d 210 (2003).

The Stovalls' legal case with the City began in August, 1998, when the Stovalls erected a rain garden type of retaining wall in their rear yard to protect their new home and property in a new subdivision from flooding and

erosion caused by failure of the developer to install proper storm drainage. Pet. App. 45, 75. In 1998, before erection of the rain garden, building permits for construction of the home and landscaping of the lot of the Stovalls had already been issued. The Stovalls secured information from the Ohio EPA and the county conservation district, which recommended installation of the rain garden, and they presented a plan consistent with such recommendation to the Streetsboro building department requesting a permit for installation of the rain garden. The Stovalls were told that no permit was needed for the rain garden facility and so proceeded to install it. However, after the rain garden was substantially installed, but not completed, the City building department issued stop orders. Pet. App. 46 et seq.

Upon investigation by the Stovalls, they eventually determined that retaining walls of similar heights to the rain garden had been and were being installed by over 42 white residents without the issuance of any permits and that the City was taking no action against them, only against the Stovalls who are black. Efforts to resolve the issue were unsuccessful and the City filed suit in the Common Pleas Court of Portage County, Ohio for injunctive relief to force the Stovalls to remove the rain garden or retaining wall. Pet. App. 14.

After Bruce Brown undertook representation of the Stovalls in April, 2000, he did not enter an appearance on behalf of himself, but submitted all filings listing "Bruce Bogart" who was a licensed Ohio attorney as the attorney of record and signed his name to such filings without permission from said Bruce Bogart. He explained to the Stovalls that the filings were being done in the name of Bruce Bogart who was co-counsel and had more recognition in Portage County than he. Pet. App. 49.

The City filed a motion for summary judgment with required affidavits and certifications attached. Pet. App. 14. However, the imposter attorney, Bruce Brown, filed only a brief in opposition with some exhibits attached, but with no affidavits, certifications, or other Rule 56 evidence attached or incorporated. Pet. App. 17, 18, 50. The trial court granted the City's motion and issued an injunction to the Stovalls to remove the rain garden "construing the Civ.R. 56(c) evidence in favor of the Stovalls," but in actuality there were no affidavits, certifications, or other Rule 56(c) evidence submitted by the Stovalls' imposter attorney. Pet. App. 10.

The imposter attorney, Bruce Brown, then filed an appeal from the trial court's judgment and submitted a brief to the Ohio Court of Appeals for the Eleventh Appellate District, all done in the name of "Bruce Bogart" as attorney, whose name was again signed without permission contrary to the Stovalls' understanding. Pet. App. 21. After the case was fully briefed, the real Bruce Bogart learned that he was attorney of record in the case when a clerk contacted him regarding the case. He filed a motion with the court of appeals for an order removing his name as attorney of record. Pet. App. 21. The court of appeals notified the Stovalls of the removal, but instead of setting the matter for hearing to properly inform the Stovalls of their rights, on August 22, 2001, the Court simply granted Bogart's motion to remove his name, noting at page two of the judgment entry that:

> Needless to say, forgery and the illegal practice of law are serious matters, which have criminal implications; accordingly, these matters should be investigated by the appropriate officials in Portage County.

Pet. App. 22. In such notification the Court of Appeals further gave the Stovalls only less than 20 days to investigate and recover from the revelation that their attorney was a fraud and imposter and the option to either: (1) hire a new attorney to make an appearance or (2) let the matter proceed on the briefs filed pro se. Pet. App. 24. These were not options at all, however, since they both left the Stovalls with the damage done by the improper representation at the trial level. Further, the Stovalls had no idea that Bruce Brown was not an attorney and they were unable to determine that and retain a new attorney in the time allowed. Forcing them to proceed pro se imposed reliance on the patently deficient representations and filings of the imposter upon them. Pet. App. 45.

On September 24, 2001, the state court of appeals rendered its decision upholding the trial court judgment granting the City summary judgment. At pages 5 and 6 of the opinion, the court of appeals made clear the basis for its decision, to wit: the Stovalls (i.e., the imposter) did not present any Rule 56(c) evidence and no evidence or stipulation may be considered except as stated in the rule. Pet. App. 17-19.

The Stovalls did not learn that Bruce Brown was not an attorney and was convicted of 44 felony counts of unauthorized practice of law until October 25, 2001, and they were shocked by this revelation. Pet. App. 50 & 51.

On November 8, 2001, a Motion for Relief from Judgment was filed on behalf of the Stovalls at the trial court, urging that the Stovalls and the Court had been defrauded, and timely and properly raising the due process and right to court access issue presented in this Petition. Pet. App. 41. From the Motion for Relief from Judgment

and upon hearing of the Motion on December 31, 2001, the constitutional issues had been raised, the trial court was on notice and knew that the Stovalls had been denied their day in court, i.e., due process, and equal protection under the laws. Pet. App. 41, 68-71. The trial court then and there was informed and knew that:

(1) The Stovalls had been deprived of "due process" of law, including their day in court, by reason of being defrauded by imposter attorney Bruce Brown who represented them before said court;

(2) The Stovalls had been prejudiced by the incompetent, unauthorized practice of law by Bruce Brown who failed to submit affidavits and other evidence required in opposing a summary judgment motion;

(3) The court had granted summary judgment against the Stovalls enjoining them to remove the rain garden retaining wall installed on their property to protect theirs and adjoining property from flooding and erosion per OEPA suggestion, based solely upon the City's summary judgment motion, affidavits, and evidence and had given no consideration to the Stovalls' incompetent submission provided by imposter attorney Bruce Brown who submitted no summary judgment evidence in opposition;

(4) The Stovalls would have been entitled to judgment denying summary judgment, if their affidavits, etc., denying the allegations sworn to by City affidavits filed with the Motion for Relief from Judgment had been filed and considered in the Summary Judgment Proceedings;

(5) The Stovalls had been told by the City's Building Department staff they didn't need a permit for installing their rain garden retaining wall to protect

their property from flooding and erosion when the Stovalls attempted to apply for such a permit;

(6) The Streetsboro Law Director and Building Department staff later reversed the City's position with the Stovalls who are black persons, holding that a permit was needed after the Stovalls had already substantially installed their rain garden retaining wall;

(7) The Stovalls were likely denied "equal protection" of the laws, since their check of public records in the Streetsboro Building Department confirmed that approximately 42 white persons were allowed to construct retaining walls on their properties without any City permits both before and after the Stovalls had installed their rain garden retaining wall; and that

(8) Obeying the Court's injunction would hurt the Stovalls and their neighbors by causing "a condition of flooding and erosion" that "will cause more problems for the residents of Deer Meadow Blvd.", especially since the City and Drees Homes had never installed a "pipe to handle the runoff . . . over the adjoining properties to an appropriate outlet" per letter written on August 4, 2000. Pet. App. 75. (As of this date the City has still not corrected this condition.)

The Motion for Relief from Judgment was made as soon as possible after the Stovalls were able to secure new counsel in early October, 2001. Pet. App. 57. This motion was supported by affidavits and certifications, and other Rule 56(c) evidence establishing defenses and material facts in favor of the Stovalls relative to the deprivation of their equal protection rights, and it gave a clear basis for vacating the earlier summary judgment by reason of the

imposter attorney's illegal participation in the case. Pet. App. 4 et seq. & 60 et seq. The trial court nevertheless denied the motion on January 31, 2002, completely disregarding the invalidity of the summary judgment and the constitutional issues presented by the imposter's representation of the Stovalls. Pet. App. 20.

An appeal from the trial court's refusal to set aside the judgment was taken to the Ohio Court of Appeals wherein the Stovalls again asserted their constitutional issues. Pet. App. 82-86. On April 28, 2003, the court of appeals upheld the decision of the trial court, holding essentially that the failure of the Stovalls to secure new counsel within less than 20 days of the court of appeals' August 22, 2001 order and notice imputed all the acts of the imposter, non-licensed attorney to the Stovalls, and that the September 22, 2001, court of appeals decision was res judicata and barred the Stovalls' motion for relief from judgment. Pet. App. 5. Again, this decision completely disregarded the fact that a judgment obtained with the participation of an unlicensed attorney is void and a nullity and that the Stovalls had no chance to recover damages for malpractice against an unlicensed and uninsured imposter or under Ohio's Victims of Crime program. Since, the Stovalls were unable to snap their fingers, investigate the status of their attorney who continued to tell the Stovalls he was a licensed attorney and locate a new attorney for a rather complex situation involving an injunction, summary judgment law, and the unauthorized practice of law before the time expired, less than 20 days, the case had proceeded as if *pro se* by **default** as ordered by the Court of Appeals. Although the court achieved efficiency and a clean docket from these actions, achieving justice and

fairness for the victims of unauthorized practice of law was callously ignored.

The April 28, 2003, Court of Appeals opinion statement that "nothing new in the way of a meritorious defense" was offered by the Motion to Vacate (Pet. App. 4 & 5) was disingenuous in light of the court's statement in its September 24, 2000 opinion that the Stovalls only attached a couple of unauthenticated documents and did not set forth specific facts to demonstrate the existence of a genuine issue for trial. Pet. App. 17 & 18. Whatever the arguments that were asserted by the imposter attorney, both the Trial Court and the Court of Appeals *did not consider them* for want of summary judgment evidence to support them. Pet. App. 10, 17-19. Both the trial court and court of appeals swept under the rug the dirty facts sworn to by Phyllix Stovall that Streetsboro ordinances allowed 42 white persons to install retaining walls as part of landscaping similar circumstances to the Stovalls' wall, but only the Stovalls who happen to be black needed one. Pet. App. 48, 61-65 & 66.

Inferences and guesses aside, the Court of Appeals in its final decision completely disregarded the facts that (1) it knew absolutely nothing of imposter attorney Bruce Brown or who had made the submissions on behalf of the Stovalls when it ordered the Stovalls to either secure a new attorney or go *pro se* (Pet. App. 21 et seq.) and (2) the Stovalls did not learn that Bruce Brown was not an attorney until October 25, 2001, i.e., two weeks before their motion for relief from judgment was filed, and they were shocked by this revelation. Pet. App. 50 & 51.

An appeal and Memorandum in Support of Jurisdiction were then filed with the Ohio Supreme Court, in

which the Stovalls once again argued that they had been denied their day in court by reason of their representation by the imposter attorney, thereby preserving the due process and right to petition issue presented in this Petition. Pet. App. 104, 108, 115, 117-119. The Ohio Supreme Court ignored the constitutional issue, and summarily declined jurisdiction to hear the case on September 10, 2003, stating that the case did not involve "any substantial constitutional issue." Pet. App. 20. The Ohio Supreme Court thereby fully failed in its obligation and duty to protect the citizens of the state of Ohio from the ravages of the unauthorized practice of law. By its regulations, enforcement, and decision in this case, the Ohio Supreme Court totally failed to prevent, protect from, or otherwise allow a remedy to those who are damaged and denied the right to present a claim or defense, i.e., the Stovalls, by the fraudulent and unauthorized practice of law.

Unless this Court accepts the Stovalls' case for discretionary review, they are without any recourse to redress the compound violation of their constitutional rights. Not only have the Stovalls been denied the right to present the merits of *any* legal defense against the City in court, but as a result they have no remedy for the City's discriminatory conduct. Thus, because of the state courts' refusal to set aside a patently void judgment, the Stovalls have been denied any fair opportunity to redress the violation of their equal protection rights.

REASONS FOR GRANTING THE PETITION

The Stovalls are completely innocent victims of the fraudulent and unauthorized practice of law in their

aborted attempt to assert a violation of their equal protection rights by the City. Under the widely accepted American rule, the fact that the Stovalls' so-called attorney was unlicensed rendered the judgment obtained against them in favor of the City a nullity. The Ohio courts came to a strikingly different conclusion, upholding an overtly void judgment that resulted from the unconscionable deceit of the Stovalls by an imposter attorney, depriving the Stovalls of their constitutionally-based legal defense against the City. The decision of the Ohio Supreme Court that refused to review the validity of the judgment in favor of the City thus conflicts with other states on a question that raises the issues of due process and the right to petition for redress of grievances. This conflict is significant and worthy of review by this Court because it impacts the fundamental right of access to the courts, and in particular impacts minority groups who are often victimized in the exercise and assertion of their legal rights by the unauthorized practice of law. It also raises an important question of constitutional law that this Court has never decided, but that should be resolved because it goes to the very heart of court access and affects the public's confidence in the American judicial system.

More than seventy years ago this Court held that a state court decision denying a civil litigant any practical opportunity to obtain relief constituted a violation of due process, and that there was no less a violation simply because the result was accomplished by the judiciary as opposed to the legislature. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 679-80 (1930). While conceding the authority of state instrumentalities to declare the laws of the state, the decision went on to state as follows:

> Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense – whether it has had an opportunity to present its case and be heard in its support. . . . While it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Id. at 681-82.

Richards v. Jefferson County, Alabama, 517 U.S. 793, 803 (1996), similarly recognized that a "State may not deprive individual litigants of their own day in court." "The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

The constitutional right of access to courts also derives from the right to petition the government for redress of grievances embodied in the First Amendment. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). "Certainly the right to petition extends to all departments of the Government," and the right of access to courts is but one aspect of the right of petition. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

It is not enough that the Stovalls were permitted to respond to the action by the City. The right of access to courts does not consist simply of the pro forma right to file pleadings in the courts. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), this Court held unconstitutional a state rule requiring the payment of court fees and costs by indigents seeking to file divorce actions as a denial of the right of access to the courts, and in the course of so holding stated as follows:

> Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "wherever one is assailed in his person or his property, there he may defend," *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). *See Baldwin v. Hale*, 1 Wall. 223 (1864); *Hovey v. Elliott*, 167 U.S. 409 (1897). The theme that "due process of law signifies a right to be heard in one's defence," has continually recurred in the years since *Baldwin*, *Windsor*, and *Hovey*. Although "many controversies have raged about the cryptic and abstract words of the Due Process Clause," as Mr. Justice Jackson wrote for the Court in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*, at 313.
>
> Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example,

> enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, . . . or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication. . . . What the Constitution does require is "an *opportunity* * * * granted at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (emphasis added), "for [a] hearing appropriate to the nature of the case," *Mullane v. Central Hanover Bank & Trust Co., supra*, at 313.

401 U.S. at 377-78 (some citations omitted) (footnote omitted).

There is also no doubt that the Ohio Supreme Court's denial of review of the lower court's decision conflicts with Ohio decisional authority and that of other states. Contrary to Ohio precedent, the state trial and appellate courts failed to recognize the very basic legal principle that a judgment obtained with the participation of an unlicensed attorney is void. *See Alliance Group, Inc. v. Rosenfield*, 115 Ohio App. 3d 380, 685 N.E.2d 570 (1996) (any filing by non-attorney agent of corporation is a nullity and may be stricken; null and void complaint cannot be corrected; defect is corrected by filing new complaint.) The state courts' refusal to grant relief from the judgment against the Stovalls also sharply conflicts with the "general American rule [] that an unlicensed person cannot appear in court for another person, and that the resulting judgment is a nullity." *Russell v. Dopp*, 36 Cal.App.4th 765, 775 (1995); *see State ex rel. Mather v. Carnes*, 551 S.W.2d 272, 288 (Mo. App. 1977) ("That the question of professional qualification to act as counsel for a party to

the litigation was not raised by the plaintiff until his appeal and brief does not diminish the power of a court to act, even on judicial notice alone, on a matter so vital to the public protection."). "Two public policies underlie the strictures against the unlicensed practice of law. First, attorneys must be licensed so that the public is protected from being advised and represented by persons who are not qualified to practice law. [Citation omitted.] Second, the litigation of cases by unlicensed attorneys threatens the integrity of the judicial process itself. [Citation omitted.]" *Russell v. Dopp*, 36 Cal.App.4th at 773.

Numerous other jurisdictions subscribe generally to the nullity or voidness rule or some variation of it. *See, e.g., McKenzie v. Burris*, 255 Ark. 330, 500 S.W.2d 357 (1973) (it is widely held that proceedings in suit instituted or conducted by one not entitled to practice law are a nullity); *Leonard v. Walsh*, 73 Ill. App. 2d 45, 220 N.E.2d 57 (1966) (action instituted on behalf of individual by a non-attorney agent required vacatur of judgment and dismissal of the suit); *Marken Real Estate & Management Corp. v. Adams*, 56 Ill. App. 3d 426, 14 Ill. Dec. 139, 371 N.E.2d 1192 (1977) (proceedings were a nullity and judgment was void where complaint was signed by layperson on behalf of corporation); *Turkey Point Property Owners' Ass'n v. Anderson*, 106 Md. App. 710, 666 A.2d 904 (1995) (nonlawyer's filing of petition and representation of association at trial rendered petition as well as trial proceedings a nullity; judgment vacated); *Gonsior v. Alternative Staffing, Inc.*, 390 N.W.2d 801 (Minn. App. 1986) (under general nullity rule, appeal by one not licensed to represent another would be dismissed where client consciously chose to be represented by non-attorney; under the facts, rule would be applied in future); *Niklaus*

v. Abel Construction Co., 164 Neb. 842, 83 N.W.2d 904 (1957) (action was brought on behalf of municipality by disbarred lawyer who participated in trial; proceeding was a nullity); *see also* 7 C.J.S. Attorney & Client § 31 (1980) (stating the general rule that proceedings in a suit by a person not licensed to practice law are a nullity).

By refusing to set aside the void judgment, and thus depriving the Stovalls of the opportunity to be heard on the merits of their constitutional equal protection claim, the Ohio Supreme Court's decision violates the assurances of the First and Fourteenth Amendments that citizens will have a meaningful opportunity to present their claims for judicial determination. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra.* In 1915, Justice Holmes recognized that procedural fairness is the essence of the constitutional guarantee of due process of law: "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard." *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting).

Procedural fairness is entwined in the development and history of our liberty. Justices Brandeis and Frankfurter eloquently explained that liberty consists of procedural regularity and procedural safeguards: "[I]n the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting). *See also McNabb v. United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J.) ("The history of liberty

has largely been the history of observance of procedural safeguards.").

The Ohio Supreme Court disregarded these principles and denied the Stovalls basic procedural fairness by affirming a judgment that was brought about through their representative's fraudulent and unauthorized practice of law. Its decision thus offends any sense of fair play.

The considerations presented by the facts of this case are thus similar to those that were at stake in this Court's decision in *Brinkerhoff-Faris Trust & Savings Co.* v. Hill, 281 U.S. 673 (1930). There, this Court evaluated whether the plaintiff had been accorded any meaningful due process, and the Court left no doubt on this issue. The constitutional right to equal protection under the law the petitioners seek to enforce here is at least as vital and significant to the persons affected adversely by the state action as that complained of by the affected parties in *Brinkerhoff-Faris*. Moreover, the inability to obtain relief from a judgment resulting from the unauthorized practice of law further endangers a judicial system that is already tainted by unscrupulous, unlicensed legal consultants.

A man extradited from Michigan to Massachusetts in 2002 for similar conduct that could lead to similar constitutional injuries:

> Though disbarred in 1990, Kaigler allegedly continued to practice law illegally, and acted as a lawyer to some clients, claiming to act in their best interests, while he was actually stealing from them. A number of victims lost their homes as a result of Kaigler's alleged fraud.
>
> Acting as their attorney, Kaigler allegedly told his victims that if they gave him their money, he

> would file for bankruptcy on their behalf and save their homes from foreclosure. Victims lived all over Massachusetts, including in Hudson, Easthampton, Walpole and Worcester.
>
> Kaigler allegedly arranged to have victims pay fees up front, then make monthly payments to him. Kaigler allegedly never forwarded the money to the mortgage holders, and instead, kept it for his own personal use.
>
> In addition, Kaigler allegedly represented people in criminal and civil cases throughout the state. In those circumstances, Kaigler allegedly again misrepresented himself and stole their money.

Office of Massachusetts Attorney General, Press Release, dated January 10, 2002, http://www.ago.state.ma.us/txt/kaigler.htm

The press release on enactment of California's third unauthorized practice of law bill, August 7, 2003, stated:

> The unauthorized practice of law has become rampant in Latino and Asian communities that often rely on legal consultation for immigration-related issues. The Los Angeles District Attorney's Office has cited numerous cases in which individuals seeking legal advice have been defrauded out of thousands of dollars.

News Release by Office of California State Senator Gloria, regarding Senate Bill 337, dated August 7, 2003, http://democrats.sen.ca.gov/servlet/gov.ca.senate.democrats.pub.members.memDisplayPress?district=sd24&ID=1803.

The Stovalls' case should be used to set a legal precedent that will safegaurd the constitutional rights for victims of the unauthorized practice of law.

Unfortunately, the foregoing cases are just the tip of the iceberg in the burgeoning unauthorized practice of law that, if its effect is not addressed by this Court, threatens to destroy the public's confidence in the judicial system. The Ohio Supreme Court had the ability and means to provide an avenue for redress by the Stovalls by simply invoking the firmly established legal principle that a judgment obtained by participation of an unlicensed attorney is void. By refusing to grant this relief, its decision conflicts with those of other state courts, as well as with the right to petition for redress of grievances and right to due process that are fundamental guarantees of the First and Fourteenth Amendments.

CONCLUSION

Based upon the foregoing authority, Petitioners believe that this Court has more than adequate grounds to accept this case for review.

Dated this 9th day of December, 2003.

Respectfully submitted:

HENRY B. FISCHER
Counsel of Record
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IN THE COURT OF APPEALS
ELEVENTH APELLATE DISTRICT
PORTAGE COUNTY, OHIO

CITY OF STREETSBORO Plaintiff-Appellee, -vs- ENCORE HOMES, et al., Defendants, RAY STOVALL, et al., Defendants-Appellants.	**OPINION** **CASE NO. 2002-P-0018** (Filed Apr. 28, 2003)

Civil Appeal from the Portage County Court of Common Pleas, Case No. 99 CV 0532.

Judgment: Affirmed.

Chad Murdock, City of Streetsboro Law Director, 9184 State Route 43, Streetsboro, OH 44241 (For Plaintiff-Appellee).

Henry B. Fisher and *Julie A. Fischer*, Henry B. Fischer Co., L.P.A., 26111 Brush Avenue, #400, P.O. Box 32644, Cleveland, OH 44132 (For Defendants-Appellants).

DIANE V. GRENDELL, J.

Ray and Phyllix Stovall ("appellants") appeal the January 31, 2002 decision of the Portage County Common Pleas Court. In that decision, the trial court denied appellants' Civ.R. 60(B) motion to vacate, finding that appellants lacked a meritorious defense. For the following

reasons, we affirm the decision of the trial court in this matter.

In the pursuit of accuracy, a thorough review of the procedural history in this matter is necessary. It is well documented that in June of 1999, appellants, citizens of the City of Streetsboro ("appellee"), attempted to erect a retention wall to help curb the damaging effects of soil erosion in their backyard. Subsequently, appellee filed a motion for injunctive relief on June 24, 1999, claiming appellants needed a permit to construct such a wall. Following an exchange of summary judgment motions, the trial court ruled in favor of appellee on July 28, 2000. Appellants then appealed that decision to this court. See *Streetsboro v. Encore Homes*, 11th Dist. No. 2000-P-0089, 2001-Ohio-4318, 2001 Ohio App. LEXIS 4281.

During the process of appellants' initial appeal, but prior to this court's actual consideration of the case, it came to the attention of this court that appellants' trial counsel was unlicensed to practice law in the State of Ohio. Faced with this unusual dilemma, we proceeded to give appellants a choice. Per our judgment entry dated August 22, 2001, appellants were given twenty days to notify this court whether "they wish to have the opportunity to consult and hire a new attorney to represent them * * * , or whether they wish for this Court to consider their present brief as a pro se brief so that the instant appeal could go forward for final determination." In that judgment entry, this court also stated that if no response was received within twenty days, "the present brief before this court will be considered a pro se document and the appeal shall go forward." Having the choice, appellants chose to submit the existing brief as a pro se brief. This court, in a de novo review on the merits, subsequently affirmed the

trial court's decision to grant summary judgment in favor of appellee on September 21, 2001.

On November 8, 2001, appellants filed a motion to vacate the trial court's July 28, 2000 decision granting summary judgment in favor of appellee. In their motion, appellants claimed that due to the fraud perpetrated upon the trial court by their unlicensed counsel, they were entitled to have the judgment vacated pursuant to Civ.R. 60(B). The trial court denied appellants' motion on January 31, 2002. This timely appeal followed. Appellants assert one assignment of error for our review:

"[1.] The trial court abused its discretion and erred as a matter of law by denying the Stovall's motion for relief from judgment and ruling that the Stovall's new evidence did not present a meritorious claim since the Stovall's were not required to prove a meritorious claim but that they would have one, if given the opportunity to present it."

A trial court's decision to deny a Civ.R. 60(B) motion will not be overturned absent an abuse of discretion. *State ex rel. Russo v. Deters*, 80 Ohio St.3d 152, 1997-Ohio-351. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Hopkins v. Quality Chevrolet Inc.* (1992), 79 Ohio App.3d 578, 581. In order to prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must establish that "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3),

not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146.

Appellants filed their Civ.R. 60(B) motion more than one year after the July 28, 2000 judgment; therefore, the only possibilities available to appellants in this case under Civ.R. 60(B) are (B)(4) or (B)(5). As Civ.R. 60(B)(4) deals primarily with the satisfaction of judgments, appellants are left with Civ.R. 60(B)(5), which allows relief for "any other reason justifying relief from judgment." In this case, appellants attempt to argue that the performance of their unlicensed trial counsel constituted fraud upon the trial court and prevented appellants "from having their day in court." We disagree with appellants.

Although the situation involving appellants' original trial counsel is unfortunate, a Civ.R. 60(B) motion should not be used as a substitute for appeal. *State ex rel. Richard v. Cuyahoga Cty. Commrs.* (2000), 89 Ohio St.3d 205, 207. In this case, appellants are attempting to get another opportunity to argue the same facts and issues already brought before both the trial court and this court.

In the instant case, the trial court noted in its judgment entry that after reviewing the "motions pleadings, affidavits, and exhibits," appellants "offer nothing new in the way of a meritorious defense to this judgment." "All the material facts alleged now by the Stovalls were alleged in the previous proceedings in this Court and to the Court of Appeals. None of these facts present a meritorious defense to the claim sought to be vacated." We agree with the trial court. The record indicates that in their motion to vacate, appellants included the same information from the EPA as they did in their initial summary judgment

motion. Further, the affidavits from Phyllix Stovall and Jerry Colbourne contained in appellants' motion to vacate simply restate the facts as contained in appellants' summary judgment motion from the original action, thus failing to provide any new evidence. While appellants have shown a repetitious claim or defense in the instant case, they have failed to show the possibility of a meritorious claim or defense as required by Civ.R. 60(B).

In the initial summary judgment proceedings, appellants raised the issues of discrimination and misrepresentation, and ignored appellee's argument regarding Section 1333.04 of the Codified Ordinances of Streetsboro ("C.O.S."). In its motion for summary judgment, appellee argued that appellants' retention wall did not fall under the exception contained in C.O.S. 1333.04. After reviewing the current Civ.R. 60(B) motion to vacate, we conclude appellants raise the same issues and arguments regarding discrimination and misrepresentation, but also attempt to revive their interest in C.O.S. 1333.04. As these issues had already been raised and ruled upon, the trial court, taking into account the impact of appellants' unlicensed counsel, properly found that appellants could not provide a meritorious defense to the existing claim. Indeed, a movant may not use the arguments lost in the underlying judgment to justify relief from that judgment. *Elyria Twp. Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, 603; *State ex rel. Elyria v. Trubey* (1983), 24 Ohio App.3d 44. We also note that appellants' claims in the instant case are barred by res judicata as these issues were litigated and ruled upon at both the trial court and appellate court levels. *Fort Frye Teachers Assn. v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 396.

While the issues raised by appellants' original trial counsel may not have been presented at the same level of competence as appellants' present counsel, the fact remains that the same issues and underlying facts were raised and ruled upon by both this court and the court below. Additionally, this court also gave appellants the chance to obtain new counsel before proceeding with their first appeal. Appellants chose to proceed pro se in that appeal and lost. Appellants do not get a second chance. Although appellants may have an alternative forum available to address their concerns, a Civ.R. 60(B) motion to vacate is not the proper remedy for appellants in this case. Based on the record before us, we hold that the trial court did not abuse its discretion in denying appellants' Civ.R. 60(B) motion.

Appellants' sole assignment of error is without merit. For the foregoing reasons, the decision of the Portage County Common Pleas Court is hereby affirmed.

JUDITH A. CHRISTLEY, J., concurs in judgment only.

CYNTHIA WESTCOTT RICE, J., concurs.

STATE OF OHIO) **IN THE COURT OF**
) **SS APPEALS**
COUNTY OF PORTAGE) **ELEVENTH DISTRICT**

CITY OF STREETSBORO,

Plaintiff-Appellee,

-vs-

ENCORE HOMES, et al.,

Defendants,

RAY STOVALL, et al.,

Defendants-Appellants.

JUDGMENT ENTRY

CASE NO. 2002-P-0018

(Filed Apr. 28, 2003)

For the reasons stated in the Opinion of this court, the sole assignment of error is without merit. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

/s/ Diane V. Grendell
JUDGE DIANE V. GRENDELL
FOR THE COURT

JUDITH A. CHRISTLEY, J., concurs in judgment only.

CYNTHIA WESTCOTT RICE, J., concurs.

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

CITY OF STREETSBORO,
Plaintiff,

v.

ENCORE HOMES, et al.,
Defendants.

CASE NO. 99 CV 0532

JUDGE JOHN A. ENLOW

ORDER AND JOURNAL ENTRY

(Filed Jan. 31, 2002)

This matter is before the Court upon motion of Defendants Ray and Phyllix Stovall ("Stovalls") to vacate this Court's entry of July 28, 2000, granting Plaintiff City of Streetsboro a permanent mandatory injunction requiring Stovalls to remove a block wall placed at the back of their property.

The Ohio Supreme Court in *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, (1976), 47 Ohio St.2d 146, set out three requirements which must be met before this Court may vacate a judgment. That case explains, in pertinent part, as follows:

> "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken."

In filing their motion and at hearing the Stovalls offer nothing new in the way of a meritorious defense to this judgment. All the *material* facts alleged now by the

Stovalls were alleged in the previous proceedings in this Court and to the Court of Appeals. None of these facts present a meritorious defense to the claim sought to be vacated.

Upon review and consideration of the motions, pleadings, affidavits, and exhibits filed herein and offered at hearing, the Court concludes that the Stovalls' motion to vacate is not well taken.

IT IS THEREFORE ORDERED that the motion of Defendants Ray and Phyllix Stovall to vacate this Court's entry of July 28, 2000, be and hereby is denied.

Costs taxed to Stovalls.

The Clerk is directed to serve upon all parties notice of this judgment and its date of entry upon the journal in accordance with Civ. R. 58(B).

SO ORDERED.

/s/ J Enlow
JOHN A. ENLOW
JUDGE, COURT OF
COMMON PLEAS

cc: L. James Martin, Attorney for Plaintiff
Anthony E. Brown, Attorney for Drees
Henry B. Fischer, Attorney for Stovalls
Julie A. Fischer, Attorney for Stovalls
Rodney L. and Thelma Berricker, Defendants
Michael and Jean Utz, Defendants
J & S Construction, Defendant

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

CITY OF STREETSBORO,	CASE NO. 99 CV 0532
Plaintiff,	JUDGE JOHN A. ENLOW
v.	**ORDER AND JOURNAL ENTRY**
ENCORE HOMES, et al.,	
Defendants.	(Filed Jul. 28, 2000)

This matter is before the Court upon motion of Plaintiff City of Streetsboro ("Streetsboro") for summary judgment on its claim for a permanent mandatory injunction against Defendants Ray and Phyllix Stovall ("Stovalls").

At this stage of the proceedings, the granting of judgment is only proper where no genuine issue of material fact remains for determination, the evidence being construed most strongly in favor of the defending party. Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327. Initially, the movant has the burden of demonstrating to the court that there is no genuine issue of material fact. "To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. * * * If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293. After the movant has met that burden, the defending party cannot rest on his pleadings, but must produce some credible evidence on those issues upon which he bears the burden of proof at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, at syll. 3.

In Streetsboro's complaint, it seeks "a permanent order mandating * * * removal" of a block wall constructed by the Stovalls at the back of their property. The Civ.R. 56(C) evidence submitted shows that the Stovalls constructed a retaining wall at the rear of their property without the necessary grading and building permits. As this structure was constructed without the required permits, Streetsboro has sought injunctive relief on that basis, including a mandatory injunction requiring removal of the wall.

Upon review and consideration of the motions, pleadings, affidavits, and exhibits filed herein, and construing the Civ.R. 56(C) evidence in favor of the Stovalls, the Court concludes that Streetsboro is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED that the motion of Plaintiff City of Streetsboro for summary judgment on its claims for a permanent and mandatory injunction against Defendants Ray and Phyllix Stovall be and hereby is granted, and the Stovalls are hereby required to remove the block wall placed at the back of their property.

Costs taxed to Stovalls.

The Clerk is directed to serve upon all parties notice of this judgment and its date of entry upon the journal in accordance with Civ. R. 58(B).

SO ORDERED.

/s/ J Enlow
JOHN A. ENLOW
JUDGE, COURT OF
COMMON PLEAS

cc: L. James Martin, Attorney for Plaintiff
Anthony E. Brown, Attorney for Drees
Bruce P. Bogart, Attorney for Stovalls
Rodney L. and Thelma Berricker, Defendants
Michael and Jean Utz, Defendants
J & S Construction, Defendant

COURT OF APPEALS

ELEVENTH DISTRICT

PORTAGE COUNTY, OHIO

CITY OF STREETSBORO,

Plaintiff-Appellee,

– vs –

ENCORE HOMES, et al.,

Defendants,

RAY STOVALL, et al.,

Defendants-Appellants.

JUDGES

HON. WILLIAM M. O'NEILL, P.J.,
HON. ROBERT A. NADER, J.,
HON. DIANE V. GRENDELL, J.

ACCELERATED
CASE NO. 2000-P-0089

OPINION

(Filed Sep. 24, 2001)

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas Case No. 99 CV 0532

JUDGMENT: Affirmed.

L. JAMES MARTIN
CITY OF STREETSBORO
LAW DIRECTOR
9184 State Route 43
Streetsboro, OH 44241

(For Plaintiff-Appellee)

RAY STOVALL, pro se
PHILLIX STOVALL, pro se
2082 Deer Crossing Drive
Streetsboro, OH 44241

(Defendants-Appellants)

GRENDELL, J.

This is an accelerated calendar appeal. Defendants-appellants, Ray and Phillix Stovall ("Stovalls"), appeal the July 28, 2000 judgment entry by the Portage County Court of Common Pleas, granting summary judgment in favor of

plaintiff-appellee, the City of Streetsboro ("Streetsboro"). For the following reasons, we affirm the lower court's decision.

On July 21, 1999, Streetsboro filed an amended complaint for injunctive relief to prevent the Stovalls from completing construction of a concrete block wall along the rear and side boundaries of their property and from filling in their rear property to the height of the wall.[1] Streetsboro alleged violation of various ordinances and regulations and failure to abide by the topographic layout plan that was submitted with the Stovalls' original building permit application. Specifically, Streetsboro claimed the height of the wall, six feet at one point, was prohibited, an unlicensed contractor performed the construction, and the Stovalls failed to modify their original permit or obtain the necessary permits for construction of the wall and for filling and grading their yard.

On May 18, 2000, Streetsboro filed a motion for summary judgment pertaining to the Stovalls. In response, the Stovalls filed a brief in opposition, and, on July 27, 2000, Streetsboro filed a reply brief. The following day, the trial court granted Streetsboro's motion, concluding the Stovalls began construction of the retaining wall without the required permits; hence, as a matter of law,

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[1] In addition to naming the Stovalls as defendants, Streetsboro also named Encore Homes, The Drees Company, Jerry Coulburne and/or J & S Construction Company, Michael and Jean Utz and Rodney and Thelma Barriker. Michael and Jean Utz filed a cross claim against the Drees Company. Rodney and Thelma Barriker filed cross-claims against the Drees Company and the Stovalls. *Only* the Stovalls and Streetsboro are parties to the instant appeal. The remaining parties and cross-claims were dismissed after the Stovalls filed the instant appeal.

Streetsboro was entitled to a permanent injunction. The trial court ordered the Stovalls to remove the portion of the wall that was erected.

On August 15, 2000, the Stovalls filed a timely notice of appeal. In their sole assignment of error, the Stovalls contend the Streetsboro Planning and Zoning Code does not indicate whether a "retaining wall" is included in the definition of "wall." The Stovalls aver Streetsboro engaged in selective enforcement and discrimination because no other permits were on record for other retaining walls. The Stovalls also argue, during the December 21, 1998 city council meeting, it was stated that the building department granted permission to them and that a permit for a retaining wall was unprecedented. Finally, the Stovalls assert Mike August of the building department informed them that a permit was not required.

This accelerated case comes before us on a motion for summary judgment; accordingly, we must apply the appropriate standard of review set forth in Civ.R. 56. See *Ormet Primary Aluminum Corp. v.. Employers Ins. of Wausau* (2000), 88 Ohio St.3d 292. Pursuant to Civ.R. 56(C), Streetsboro bears the initial burden of supporting its motion with sufficient and acceptable evidence, demonstrating the lack of a genuine issue and that reasonable minds can come to but one conclusion which is adverse to the Stovalls. See *State ex rel. Morley v. Lordi* (1995), 72 Ohio St.3d 510. A *de novo* review of the exhibits included with Streetsboro's motion for summary judgment demonstrates that Streetsboro satisfied its initial burden under Civ.R. 56(C). The topographical layout plan, submitted with the Stovalls' original permit application, reveals that a concrete retaining wall was not included. The Streetsboro ordinances and regulations support Streetsboro's

contention that permits are required for the construction of such a wall and for filling and grading. The affidavits of MaryAnn Howitt and Mike August of the Streetsboro Building Department attest to the accuracy of the topographical grading plan, state no other permits were issued, and indicate the Stovalls were not told that a permit was not required for their retaining wall.

Specifically, the Codified Ordinances of Streetsboro ("C.O.S.") provide that a permit shall be required for every "filling" and/or "grading," which is defined as the placement of soil, gravel, etc., on the ground and any operation involving excavation and/or filling. C.O.S. Section 901.03 (passed 1-27-97). In limited instances, not applicable to the instant case, a permit is not required to fill and grade when excavating streets, drains, utilities, sewerage systems, farming, gardening, or when a duly issued building permit is already obtained. C.O.S. Section 901.04 (passed 1-27-97). Moreover, a building permit shall be obtained before proceeding with the construction of any appurtenant structure. C.O.S. Section 1303.01(a).[2] "Structure" is defined as anything constructed or erected, requiring a permanent location on the ground or attaching to something having a permanent location on the ground, *i.e.* billboards, fences, *walls,* etc. C.O.S. Section 1103.02(108) (1991 replacement); see, also, Section 1103.02(115) (1999 replacement).

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[2] Section 1301.01(a) lists its enactment date as 1-11-99; however, ordinances prior to its enactment similarly required an individual to obtain permission for the construction of any "structure" by applying to the zoning inspector for a zoning certificate. Streetsboro Planning and Zoning Code Section 1107.01(a) (passed 8-28-89).

Faced with a similar issue, the court in *Elsaesser v. Hamilton Bd. of Zoning Appeals* (1990), 61 Ohio App.3d 641, held the erection of three crosses, ranging in height from twelve to sixteen feet, were "structures" because they were constructed and permanently buried into the ground, indicating the intention that they would remain there for an indefinite period. Similarly, in *Miami Conservancy Dist. v. Elleman* (1976), 50 Ohio App.2d 357, paragraph two of the syllabus, the court held "structure" is a generic term which includes all types of enclosures that rest on or in the ground.

Streetsboro undeniably satisfied its initial burden pursuant to Civ.R. 56(C); therefore, Civ.R. 56(E) requires the Stovalls to meet their reciprocal burden by setting forth specific facts, explaining that a "genuine issue" exists and that a reasonable jury could return a verdict for them based upon the evidence. See *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447. The Stovalls may not rest upon mere allegations; rather, they must set forth specific facts showing that a genuine issue exists for trial. See *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48.

In their brief in opposition, the Stovalls attached a one-page summary of the minutes of the December 21, 1998 city council meeting, which waived the $50 variance fee and/or appeal for the Stovalls' retaining wall. The summary is as follows:

> "*Concerning the request to waive the fees for a variance and/or appeal* for Mr. and Mrs. Stovall, Mr. Rivers stated he met with them last week to discuss their retaining wall situation. Mrs. Henzel explained the Building Department told them they could erect the wall without City

> involvement, however *the Law Director has since ruled a permit is required.* Mr. Martin advised that it would be appropriate to waive the fees and sufficient grounds exist to properly do so. Mr. Gargas agreed." (Emphasis added.)

This excerpt from the city council meeting is a summary of the minutes, *not* a complete transcript. This summary demonstrates that there was a prior meeting between the Stovalls and other individuals concerning the issues related to their retaining wall. Clearly, this summary does not set forth specific facts to support the Stovalls' contention that, during the meeting, it was stated that the building department granted permission to them and that the requirement of a permit for a retaining wall was unprecedented. Additionally, the Stovalls failed to provide any specific facts, demonstrating the existence of a genuine issue as to the allegation that Mike August informed them that a permit was not required.

Next, the letters from the Portage Soil and Water Conservation District and the Ohio E.P.A., stating that erosion was evidenced on the Stovalls' property, is not relevant to the issues in the instant appeal. Finally, the issues raised in the letter from the Ohio Civil Rights Commission, responding to the complaint filed by the Stovalls, stating it was *probable* that discriminatory housing practices existed to prevent them from building their wall, is not before us at this time; rather, such issues are part of a separate proceeding.

In conducting our *de novo* review as to whether the Stovalls met their reciprocal burden, construing the evidence in a light most favorable to the Stovalls, the Stovalls did *not* set forth specific facts to demonstrate the existence of a genuine issue for trial. Reasonable minds

could not differ on the issue that the Stovalls failed to obtain the required permits or modify their original building permit prior to the construction of their wall and the filling and grading of their yard. Streetsboro was entitled to summary judgment as a matter of law. Accordingly, the entry of injunction, preventing completion of the wall and ordering removal of the existing wall was appropriate. We affirm the judgment of the trial court.

/s/ Diane V. Grendell
JUDGE DIANE V. GRENDELL

O'NEILL, P.J.,

NADER, J., concur.

STATE OF OHIO) IN THE COURT OF APPEALS
) ss
COUNTY OF PORTAGE) ELEVENTH DISTRICT

CITY OF STREETSBORO,
Plaintiff-Appellee,

-vs-

ENCORE HOMES, et al.,
Defendants,

RAY STOVALL, et al.,
Defendants-Appellants.

JUDGMENT ENTRY
CASE NO. 2000-P-0089
(Filed Sep. 24, 2001)

For the reasons stated in the Opinion of this court, the assignment of error is without merit, and it is the judgment and order of this Court that the judgment of the trial court is affirmed.

/s/ Diane V. Grendell
JUDGE DIANE V. GRENDELL

FOR THE COURT

STATE OF OHIO) IN THE COURT OF APPEALS
) SS
COUNTY OF PORTAGE) ELEVENTH DISTRICT

CITY OF STREETSBORO,

Plaintiff-Appellee,

-vs-

ENCORE HOMES, et al.,

Defendants,

RAY STOVALL, et al.,

Defendants-Appellants.

JUDGMENT ENTRY

CASE NO. 2000-P-0089

(Filed Aug. 22, 2001)

The instant appeal is presently before this Court for consideration of Attorney Bruce P. Bogart's motion to remove his name as counsel of record for Ray and Phillix Stovall, Appellants. As the basis for this motion, Attorney Bogart asserts that, despite the fact that his name appears on various documents submitted to this Court, he has never represented Appellants in this case or in any other legal matter. He further avers that, although these documents appear to contain his signature, he did not compose or sign any of them.

Given the nature of the averments in Attorney Bogart's motion, this Court holds that proper grounds for the motion have been set forth. Thus, it is the Order of this Court that the motion is hereby granted. The Clerk of Courts is instructed to remove from the record the name of Attorney Bruce P. Bogart as counsel for Appellants in this appeal.

The granting of the Bogart motion, of course, leaves this appeal in an awkward procedural posture. Although an appellate brief has been filed on behalf of Appellants and the case has been set for final consideration, this Court is now aware that Appellants' brief is a forged document which was not written by a licensed attorney of this state. Obviously if the brief had been composed by a licensed attorney besides Mr. Bogart, that attorney would have signed his own name on the document. Similarly, if the brief had been written by Appellants themselves, there would have been no need for Appellants to forge the signature because they would have been allowed to file the brief *pro se*. Therefore, not only do the averments of the Bogart motion support the conclusion that the signature on Appellants' brief was forged, but they also support the inference that the brief was the product of an illegal practice of law.

Needless to say, forgery and the illegal practice of law are serious matters which could have criminal implications; accordingly, these matters should be investigated by the appropriate officials in Portage County. In addition, Appellants should be aware that there may be certain civil remedies they could pursue against the person who misrepresented to them his status to practice law in this state. However, given our status as a court of appeals, we cannot take any steps to determine what has occurred in this instance and impose sanctions upon the person who may be engaging in the illegal practice. Instead, our role is limited to ensuring that Appellants have been given the opportunity to fully litigate the issues raised in this appeal.

To that end, this Court would indicate that there are two options which Appellants can now pursue. First, given

that Appellants have been represented in this appeal by an individual who was not a licensed attorney, it follows that there is a strong possibility that they may not have been accorded professional representation, in that the brief filed on their behalf may not assert all possible issues and may not fully argue those issues. Under these circumstances, if Appellants were unaware when they hired this person that he did not have a license to practice, then they should now have an opportunity consult a licensed attorney and to have that person submit a new brief on their behalf.

On the other hand, it is also possible that, despite the fact that the present brief was not composed by a licensed attorney, it still may be sufficient to set forth all relevant issues in this case and to facilitate a proper determination of the matter. Under these circumstances, equity dictates that Appellants should not be required to hire a new attorney to represent them and that the final determination should not be delayed further. Instead, Appellants should be given the opportunity to proceed in this matter *pro se*, meaning that this Court would deem the present brief to have been filed by Appellants themselves. Under this scenario, this appeal could then go forward for final determination based solely on the brief which has already been filed.

In setting forth the foregoing two possibilities, this Court would emphasize that we have not made any determination as to the quality of the brief which is presently before us in this matter. That is a decision for Appellants to make.

Instead, we are merely trying to indicate what options Appellants now have in light of the fact that their prior

representative in this matter was not a licensed attorney. In this respect, Appellants now find themselves in the same position which all *pro se* parties face in deciding how to proceed in a civil litigation. If a *pro se* person decides to represent himself, there is always the possibility that, due to his lack of knowledge of the law, he will not raise all feasible issues on his behalf. On the other hand, if he decides to hire an attorney, there is the possibility that he could have achieved the same results without having to pay the attorney for his services.

Pursuant to the foregoing discussion, it is the further order of this Court that, within twenty (20) days of the date of this judgment entry, Appellants shall filed a new submission with the Portage County Clerk of Courts. In submitting this new document, Appellants shall specifically indicate to the Clerk of Courts that this document is to be filed in the record of this appeal. In this document, Appellants shall indicate to this Court whether: (1) they wish to have the opportunity to consult and hire a new attorney to represent them in this case; or (2) they wish for this Court to consider their present brief as a *pro se* brief so that the instant appeal could go forward for final determination. If Appellants choose the first option, they shall also include in the new document a statement concerning when they first became aware that the individual who previously represented them in this appeal was not a licensed attorney.

APPELLANTS ARE HEREBY GIVEN NOTICE THAT IF THEY DO NOT FILE ANY NEW SUBMISSION WITH THE TWENTY-DAY PERIOD, THIS COURT WILL ASSUME THAT THEY WISH TO PROCEED UNDER THE SECOND OPTION, *I.E.*, THE PRESENT BRIEF BEFORE THIS COURT WILL BE CONSIDERED A *PRO*

SE DOCUMENT AND THE APPEAL SHALL GO FORWARD.

The Clerk of Courts is hereby instructed to serve by certified mail a copy of this judgment entry upon Ray and Phillix Stovall at the following address: 2082 Deer Crossing Drive, Streetsboro, Ohio, 44241. The Clerk of Courts shall also provide notice of this judgment entry to opposing counsel in this appeal.

/s/ Judith Christley
ADMINISTRATIVE JUDGE
JUDITH A. CHRISTLEY

FOR THE COURT

The Supreme Court of Ohio

City of Streetsboro, Appellee,	:	Case No. 03-1008
v.	:	ENTRY
Encore Homes, et al.,	:	
Ray Stovall, et al., Appellants	:	(Filed Sep. 10, 2003)

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Henry B. Fisher Co., L.P.A.

(Portage County Court of Appeals; No. 2002P0018)

/s/ Thomas Moyer
THOMAS J. MOYER
Chief Justice

Defs. Exh. "L"

1991 WL 179439

NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

Court of Appeals of Ohio, Fourth District, Scioto County.

Harold Russell SCOTT, Plaintiff-Appellant,
v.
TAPS LOUNGE, INC., et al., Defendants-Appellees.

No. 1953.

Sept. 10, 1991.

Stephen C. Rodeheffer, Portsmouth, for appellant.

J. Rick Brown, Wheelersburg, for appellee Judy Martin.

DECISION & JUDGMENT ENTRY

GREY, Judge.

This is an appeal from a judgment of the Scioto County Common Pleas Court granting Appellee's Motion to Vacate pursuant to Civ.R. 60(B). We affirm.

The facts from which this case arose are not especially relevant to the merits of this appeal. The issue before this court is a procedural one rather than a substantive one.

In July 1987 Scott filed a breach of contract suit against Taps Lounge, Inc. and Judy Martin. An answer

was filed and at the second pretrial Martin's attorneys, Steve Hillman and Mark Price, requested leave to file a Motion for Summary Judgment. The court granted Martin leave to file but the Motion for Summary Judgment was never filed.

Scott then requested and was granted leave to file his own Motion for Summary Judgment. Scott did so and copies were sent to both Hillman and Price at their respective office addresses. Neither attorney responded to that Motion.

On December 22, 1988 the court granted Scott's Motion and ordered Scott's attorney to prepare a Journal Entry reflecting the court's order. Scott's attorney, Steve Rodeheffer, prepared the entry and sent a copy to Hillman. Hillman called Rodeheffer alleging that he was not aware of the Motion for Summary Judgment filed by Scott or the proceedings surrounding that motion. On January 3, 1989 Rodeheffer filed the Judgment Entry. Hillman filed no objections to the Judgment Entry nor did he file any other motion.

Scott filed a Notice to take a Judgment Debtor Examination of Judy Martin in July 1990, and only then did Martin become aware that there was a judgment against her. On August 7, 1990 Martin, who had obtained new counsel, filed a Motion for Relief from Judgment pursuant to Civ.R. 60(B).

After two evidentiary hearings on the motion, the trial court granted Martin's motion, finding that she was entitled to relief under Civ.R. 60(B)(5).

Scott appeals and assigns two errors which we will treat jointly.

FIRST ASSIGNMENT OF ERROR

"The trial court abused its discretion when it found the Defendant/Appellee met her burden of proof that she is entitled to relief pursuant to any provision of Civil Rule 60(B), inasmuch as the neglect committed by the defendant/appellee and her attorneys was inexcusable and Civil Rule 60(B)(5) may not be used as a substitute for Civil Rule 60(B)(1)."

SECOND ASSIGNMENT OF ERROR

"The trial court committed reversible error when it apparently found that the Motion for Relief from Judgment was made within a reasonable time."

Civ.R. 60(B) grants a trial court broad discretion in deciding motions filed pursuant to that rule. As a reviewing court we may only reverse a trial court's decision to grant or not to grant such a motion if we find from the record below that the trial court has abused that discretion. The term "abuse of discretion" connotes more than an error of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Tracy v. Merrell-Dow Pharmaceuticals* (1991), 58 Ohio St.3d 147; *In Re Jane Doe 1* (1991), 57 Ohio St.3d 135.

We now turn to the record below to see if the trial court committed such an abuse. It is axiomatic that the legislature created Civ.R. 60(B) to protect parties to a suit who through mistake, surprise or otherwise were not able to fully litigate their rights during any given action.

On the other hand, it is well established that the courts will impute counsel's neglect to the party, *GTE, infra,* but of course to say that begs the question in a case

like this. If counsel is negligent or dilatory and that negligence is imputed to the client, then there is no excusable neglect. But if the court in its discretion, based on the facts before it, decides not to make that imputation, then the neglect may be excusable. The real question in this case is: Must a court always impute counsel's negligence to the client? We hold that it is not required to in every case. This is where the exercise of the court's discretion comes into play.

At issue here is whether Martin's 60(B) motion was filed within a reasonable time pursuant to the mandate of the Ohio Supreme Court in *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146. Whether a period of time is reasonable depends a great deal upon the surrounding circumstances. At first blush, it certainly appears that filing a 60(B) motion for relief from judgment twenty months after the judgment entry was filed was anything but reasonable. However, if one views the filing from Martin's perspective the time within which she filed her 60(B) motion is entirely reasonable. Martin discovered that a Judgment had been taken against her in July 1990. Shortly thereafter, within weeks, she filed a 60(B) motion. The trial court held that the motion was filed within a reasonable time as contemplated by *GTE, supra.*

There are competing interests here. On one side there is the principle of finality of judgments and the non-moving party's right to have his judgment enforced. On the other is the principle of deciding cases on their merits, (paragraph three of the syllabus in *GTE, supra*), and the right of *all* parties to due process and the opportunity to be heard.

The question is which party should Civ.R. 60(B) protect? In any particular case the answer to that question lies within the discretion of the trial judge. In reviewing the trial court's decision in light of the representation rendered by Martin's attorneys below, we cannot find that the trial court's decision was so arbitrary, unreasonable or unconscionable as to require reversal. Thus, we will not disturb the trial court's decision. Scott's first and second assignments of error are not well-taken and are overruled.

JUDGMENT ENTRY

It is ordered that the judgment of the Scioto County Common Pleas Court is affirmed and judgment entered for appellee. Appellee shall recover of appellant her costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Scioto County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of filing of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

ABELE, J., concurs in judgment & opinion.

HARSHA, J., concurs with attached opinion.

HARSHA, Judge, concurring.

I concur in the result reached by the principle opinion, however, I write separately because I am not convinced that "gross neglect" is qualitatively distinct from that neglect which is redressable in Civ.R. 60(B)(1). However, the facts of this case indicate appellee was totally and completely abandoned by counsel. Such an abandonment rises above the level of gross neglect. Such an abandonment is redressable under Civ.R. 60(B)(5). See *Reno v. Internat'l. Harvester Co.* (S.D. Ohio 1986), 115 F.R.D. 6. Thus, I find no abuse of discretion by the court below.

Defs. Exh. "M".

2001 WL 276976

NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

Court of Appeals of Ohio, Eleventh District, Trumbull County.

Joseph MAYOR, et al., Plaintiffs-Appellants,
v.
WCI STEEL, INC., et al., Defendants-Appellees.

No. 2000-T-0054.

March 16, 2001.

Civil Appeal from the Court of Common Pleas, Case No. 98 CV 58, Judgment affirmed.

Atty. Bruce M. Broyles, Letson, Griffith, Woodall, Lavelle & Rosenberg, Warren, OH, for plaintiffs-appellants.

Atty. James D. Kurek, Buckingham, Doolittle & Burroughs, L.L.P., Akron, OH, for defendants-appellees.

FORD, P.J., NADER and GRENDELL, JJ.

OPINION

FORD.

Appellants, Joseph and Nancy Mayor, are appealing from a March 14, 2000 judgment entry of the Trumbull County Court of Common Pleas denying their motion for relief from judgment.

Appellant's filed a complaint against appellees, WCI Steel, Inc. ("WCI") and Jacob Reis ("Reis"), on January 12, 1998. The essence of the complaint was that appellee Reis, who had supervised appellant, Joseph Mayor, at WCI, had, by his treatment of appellant, caused him substantial emotional harm, which resulted in appellant's constructive discharge from WCI. Appellees served their first set of interrogatories and request for production of documents on appellants on March 4, 1998. On May 28, 1998, appellants filed a motion for an extension of time to answer appellees' interrogatories. On August 4, 1998, appellees filed a motion to compel. The trial court granted appellees' motion on August 11, 1998. On September 13, 1998, appellees filed a "Motion to Dismiss and for Sanctions." Appellants filed a motion in opposition on October 6, 1998. The court granted appellees "Motion to Dismiss and for Sanctions" on December 11, 1998. Appellants then filed a motion for relief from judgment on November 3, 1999. The trial court's denial of this motion in its March 14, 2000 judgment entry prompted the current appeal.

Appellants have filed a timely appeal and raised the following assignment of error:

> "The trial [c]ourt erred in denying [a]ppellants' Motion for Relief from Judgment."

Appellants contend that the trial court should have conducted a hearing prior to denying their motion for relief from judgment. We disagree.

A trial court abuses its discretion if it fails to hold a hearing on a Civ.R. 60(B) motion "where grounds for relief from judgment appear on the face of the record * * *." *U.A.P. Columbus JV326132 v. Plum* (1986), 27 Ohio App.3d 293, 294. "[I]f movant's Civ.R. 60(B) motion contains allegations of operative facts warranting relief, the trial court should grant a hearing to take evidence and either discredit or verify these facts before ruling." *Id.* at 294-295.

For appellants to be entitled to relief, they must satisfy all three prongs of the test set forth in *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150. They must demonstrate that (1) they have a meritorious claim or defense to present if relief is granted; (2) they are entitled to relief under Civ.R. 60(B); and (3) their motion was made within a reasonable time. *Id.* In our view, appellants have failed to meet the second prong of the *GTE* test; therefore, grounds for relief from judgment do not appear on the face of the record, and appellants are not entitled to a hearing on their motion.

The second prong of *GTE* requires appellants to demonstrate that they are entitled to relief under Civ.R. 60(B), which permits a court to relieve a party from a final

judgment for the following reasons: "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence * * * ; (3) fraud * * * , misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied * * * , or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from judgment."

In their motion for relief from judgment submitted to the trial court, appellants argued that they had been abandoned by their attorney.[1] While appellants claim that they did not communicate with their attorney between May 2, 1998 and October 1998, they acknowledged, in their depositions, that they had not initiated any written communication with him during that time. Further, as late as October 6, 1998, their attorney filed a motion in opposition to appellees' motion for dismissal. Therefore, we conclude that appellants' were not abandoned by their attorney.

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[1] Appellants place substantial emphasis on the fact that the attorney who represented them before the trial court, until their case was dismissed, was subject to ongoing disciplinary proceedings. While the initiation of disciplinary proceedings by the Supreme Court of Ohio may reflect poorly on an attorney's character and should raise red flags for potential clients, short of disbarment, such proceedings do not immediately disqualify an attorney from the practice of law, nor are they necessarily indicative of professional incompetence. In the instant case, appellant's attorney was not disbarred while representing appellants. He was suspended on May 13, 1998; however, the suspension was stayed. The suspension was reimposed on February 2, 1999, and he was ordered to transfer all of his client files to the Cleveland Bar Association. However, this occurred almost two months after appellants' complaint had been dismissed on December 11, 1998.

The longstanding rule in Ohio is that that behavior of counsel should be imputed to his client. *Schialdone v. Schialdone* (Apr. 21, 1995), Trumbull App. No. 93-T-5007, unreported, at 3, 1995 Ohio App. LEXIS 1647, citing *Argo Plastic Products Co. v. Cleveland* (1984), 15 Ohio St.3d 389 and *Brown v. Akron Beacon Journal Publishing Co.* (1991), 81 Ohio App.3d 135. *See, also, GTE,* 47 Ohio St.2d at 153. However, pursuant to Civ.R. 60(B)(1), a party may be granted relief from judgment if counsel's actions represent "excusable neglect."

Depending on the facts and circumstances, examples of instances where a court might find excusable neglect, include the following: the party had neither knowledge nor notice of the pending legal action; counsel of record suffers from personal or family illness; and, counsel of record fails to appear for trial because he has not received notice of a rescheduled trial date. *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 13; *The Bluffs of Wildwood Homeowners' Assn., Inc. v. Dinkel* (1994), 96 Ohio App.3d 278, 281; *Columbia Gas of Ohio v. Riley* (1987), 38 Ohio App.3d 151, paragraph two of the syllabus.

In *Brown,* the Ninth District Court of Appeals addressed, at length, the issue of to what extent an attorney's incompetence should be imputed to the attorney's client. In *Brown,* the appellant's attorney had failed to respond to the appellee's motion for summary judgment; therefore, the court entered a judgment in favor of the appellee. *Brown,* 81 Ohio App.3d 135, 137. On appeal, the appellant, former Ohio Supreme Court justice, Clifford Brown, argued that his attorney's neglect should not be imputed to him. *Id.* at 139. In rejecting the appellant's argument, the court noted that the appellant "voluntarily chose this attorney as his representative in the action, and

he cannot now avoid the consequences of the acts or omissions of this freely selected agent." *Id.* at 140. The appellant further argued that his attorney had purposely misled him into believing that he had filed a timely response to the motion for summary judgment. *Id.* at 141. The Ninth District responded that the result promoted by the appellant was paradoxical: "He would have this court relieve him completely of his responsibility for his attorney's incompetence due to the latter's extreme misconduct. A similarly situated client who selected an equally inattentive – but more scrupulous – representative would still bear the costs of his counsel's neglect." *Id.* Finally, the court concluded that "vacating the judgment of the common pleas court at this late date would unfairly penalize those parties that have been diligently abiding by the procedural rules as well as set an ominous precedent." *Id.* at 142.

In view of the decision in *Brown,* we conclude that the facts of the case at hand, place it outside the realm of excusable neglect. The record shows that appellants' attorney failed, over the course of more than nine months, to adequately respond to appellees' first set of interrogatories and request for production of documents. This amounts to the kind of " 'complete disregard of the judicial system' " that "should not * * * be tolerated under the guise of 'excusable neglect.' " *D.G.M., Inc. v. Cremeans Concrete & Supply Co., Inc.* (1996), 111 Ohio App.3d 134, 138. Therefore, in the instant case, Civ.R. 60(B)(1) is not applicable.

Since granting relief pursuant to Civ.R. 60(B)(1) is not appropriate, appellants' only remaining approach to a motion for relief from judgment would be through Civ.R.

60(B)(5): "any other reason justifying relief from judgment." The appellant in *Brown* argued, in the alternative, that he was entitled to relief from judgment under Civ.R. 60(B)(5). *Id.* at 142. The court rejected that argument, noting that the appellant's claim that his attorney was psychologically dysfunctional, rendering him incapable of performing his legal duties, would warrant relief from judgment only on the basis of excusable neglect. *Id.* at 142-143. Since the trial court had already determined that the attorney's behavior did not constitute excusable neglect, the appellant could not attempt to circumvent that ruling by resorting to Civ.R. 60(B)(5), the catch-all provision. *Id.* at 143.

Here, this court also rejects the suggestion that appellants can avoid having the actions of their attorney imputed to them by appeal to Civ.R. 60(B)(5). Generally, once an attorney's actions depart the realm of "excusable neglect," his negligence in representing his client, whether it be simple or gross, must be imputed to his client. To treat an attorney's neglect of his duties to his client as grounds for relief from judgment, regardless of whether it was excusable or inexcusable, would eviscerate Civ.R. 60(B)(1) with respect to the phrase "excusable neglect." However, under certain circumstances of egregious conduct on the part of counsel, this court would not rule out the possibility that in the event an attorney had abandoned his client, Civ.R. 60(B)(5) would be applicable. Abandonment would occur if the attorney were prohibited from practicing law by a disciplinary committee, or if the attorney refused to respond to communications from his client and failed to perform any work on behalf of his client, in which case the client would be without scienter.

Appellants, in the instant case, rely on *Whitt v. Bennett* (1992), 82 Ohio App.3d 792. In *Whitt,* the Second District Court of Appeals held that an attorney's failure to attend a hearing on a motion to dismiss for failure to comply with a discovery order was potentially a matter of extraordinary nature, and that, in such circumstances, relief from judgment may be appropriate pursuant to Civ.R. 60(B)(5). *Id.* at 797. We decline to follow *Whitt.*[2] Treating attorney incompetence or inexcusable neglect, that fails to rise to the level of abandonment, as a reason justifying relief from judgment under Civ.R. 60(B)(5) would potentially open a Pandora's box with respect to motions for relief from judgment. This court is reluctant to place itself in the position of potentially rewarding civil litigants with relief from judgment because their attorneys refused to obey court orders or failed to appear at hearings. The appropriate remedy for such incompetence is a malpractice claim.

In sum, we believe that appellants have failed to satisfy the second prong of the *GTE* test, which requires them to demonstrate that they are entitled to relief pursuant to one of the five reasons enumerated in Civ.R. 60(B). Since the grounds for relief from judgment do not appear on the face of the record, the trial court was not required to hold a hearing prior to overruling appellants' motion.

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[2] The Tenth District Court of Appeals has also held that it is "not persuaded by *Whitt* * * * ." *The Pool Man, Inc. v. Rea* (Oct. 17, 1995), Franklin App. No. 95APG04-438, unreported, at 3, 1995 Ohio App. LEXIS 4577. In *Pool Man,* the appellee's attorney failed to appear at trial. *Id.* at 1. The court held that the negligence of the appellee's attorney should have been imputed to the appellee and his motion for relief from judgment overruled. *Id.* at 3.

For the foregoing reasons, appellants' assignment of error is without merit, and the judgment of the trial court is affirmed.

NADER and GRENDELL, JJ., concur.

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

CITY OF STREETSBORO Plaintiff -vs- ENCORE HOMES, et al Defendants	) CASE No. 99 CV 0532) JUDGE JOHN A. ENLOW))))

DEFENDANT STOVALLS' MOTION FOR AN ORDER GRANTING RELIEF FROM JUDGMENT

(Filed Nov. 8, 2001)

Now come Defendants RAY STOVALL and PHYLLIX STOVALL (the "Stovalls") by their attorneys hereunto duly appointed and, hereby move this honorable court for an order pursuant to Civ.R. 60B vacating and granting relief from the summary judgment entry filed July 28, 2000, granting summary judgment and requiring the Stovalls to remove a block wall placed at the back of their property for the reasons that they were fraudulently induced by a Bruce Andrew Brown to accept his engagement and representation in the within case and before the court of appeals by false representations that he was a duly licensed attorney in Ohio and New York and that he was co-counseled in the matter by one Bruce B. Bogart (Reg. No.0023377) resulting in competent representation, forged documents not written by a licensed attorney, the product of an illegal practice of law and such other and further reasons justifying relief from the judgment which are stated in the attached supporting Brief and Affidavit which are incorporated

herein by reference the same as though fully rewritten at length.

Respectfully submitted,

Henry B. Fischer, Esq. (RN0010966)
Julie A. Fischer, Esq. (RN0070521)
Henry B. Fischer Co., L.P.A.
26111 Brush Avenue #400
Cleveland, OH 44132
Phone: 216/731-3535
Attorneys for Defendants RAY STOVALL & PHYLLIS STOVALL

PROOF OF SERVICE

A copy of the foregoing DEFENDANT STOVALLS' MOTION FOR AN ORDER GRANTING RELIEF FROM JUDGMENT was sent by regular U.S. Mail, postage prepaid, to L. James Martin, Law Director, City of Streetsboro, Ohio, 9183 SR 43, Streetsboro, OH 44241, Attorney for the Plaintiff on this 8th day of November, 2001.

/s/ Julie A. Fischer
Henry B. Fischer, Esq.
Julie A. Fischer, Esq.
Henry B. Fischer Co., L.P.A.
Attorneys for Defendants
RAY STOVALL & PHYLLIX STOVALL

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

CITY OF STREETSBORO Plaintiff -vs- ENCORE HOMES, et al Defendants	) CASE No. 99 CV 0532) JUDGE JOHN A. ENLOW))))

BRIEF IN SUPPORT OF DEFENDANT STOVALLS' MOTION FOR AN ORDER GRANTING RELIEF FROM JUDGMENT

I. STATEMENT OF CASE

This motion relates to the July 28, 2000, judgment entered in Plaintiffs' favor (the "July 28 Judgment") granting Plaintiff's motion for Summary Judgment and order requiring Defendants Ray Stovall & Phyllix Stovall (the "Stovalls") to remove a block wall placed at the back of their property (See Exhibit "D" of attached Exhibit Appendix). The Stovalls seek relief of this judgment. In a nut shell, because no certified documents or affidavits, i.e., documents meeting the requirement of Civ. R. 56(E), were submitted to the court with the filings made on behalf of the Stovalls, the evidence submitted on behalf of the Plaintiff city with its motion for summary judgment went uncontroverted and the court had little choice under well established law, but to enter judgment in favor of the Plaintiff City. An appeal was filed in this court and appellate briefs were filed in the Court of Appeals on behalf of the Stovalls.

The Stovalls were presumed to be represented by Bruce Andrew Brown and Bruce P. Bogart after Thrasher Dinsmore & Dolan withdrew as counsel. A notice of appearance was filed April 20, 2000, with the court on behalf of the Stovalls, ostensibly by "Bruce P. Bogart." The name, address, etc. under the signature line of Court papers was as follows:

> "BRUCE P. BOGART, ESQ
> Reg. No.0023377
> Complete Legal Services
> 1300 Bank One Center
> 600 Superior Avenue
> Cleveland, OH 44114
> (216) 479-6808"

and were signed "Bruce P. Bogart/Bab" purporting to be the signature of Bruce P. Bogart by Mr. Brown as authorized agent for Mr. Bogart.

On or about August 22, 2001, the Court of Appeals granted a motion of Bruce P. Bogart to remove his name as counsel of record for the reason that, although his name appears on various documents, he claims he did not represent the Stovalls in this case or in any other legal matter (the "August 22 Appellate Judgment," See Exhibit "E" of attached Exhibit Appendix). In such judgment entry, the court referred to the Appellants' Brief purportedly under Mr. Bogart's signature as "a forged documents which was not written by a licensed attorney" and that the averments of Mr. Bogart's motion "also support the inference that the brief was the product of an illegal practice of law." The Stovalls were given 20 days to exercise the option of either hiring a new attorney or proceeding *pro se* as if they had written the brief. Bruce A. Brown told the Stovall's that he was in

fact licensed to practice in Ohio and that the Court was mistaking his identity with a Bruce E. Brown who had been disbarred[1]. Since the Stovalls were confused about Bruce A. Brown's status as an attorney and the fact that they were unable to locate a new attorney within such a short period of time, by default the case was taken as if they had elected to proceed *pro se*, and on September 24, 2001, the Court of Appeals filed its judgment and Opinion sustaining the July 28 Judgment (the "September 24 Appellate Decision," See Exhibit "F" of attached Exhibit Appendix).

II. STATEMENT OF FACTS

The home of the Stovalls, who are black persons, is located at 2082 Deer Crossing in the Deer Meadow Subdivision, City of Streetsboro, County of Portage, and State of Ohio. It was built in 1996 pursuant to a building permit along with other homes in the Deer Crossing Subdivision in accordance with drainage plans approved by the City of Streetsboro. From the start, the Stovalls encountered and observed excessive erosion and gullies, especially in their rear yard. They communicated *inter alia* with the Drees Company, the City, the neighborhood association, the Ohio EPA ("OEPA"), and the Portage Soil and Water Conservation District ("PSWCD") in efforts to have the developer or City do something to arrest and control the chronic erosion problems in the subdivision, but without much success.

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[1] Bruce E. Brown, a different person than Bruce A. Brown, was in fact an Ohio attorney who had been disbarred (Reg. No. 0039782).

In 1998, the Stovalls determined to do what they could with their property to arrest and control the chronic erosion problem by means of gardening and in particular by installation of a bioretention structure commonly referred to as a "rain garden" of which the Stovalls learned about in their communications with OEPA and PSWCD. The Stovalls went to the Building Department with their plans and requested a permit.

A. MOVANT HAS A MERITORIOUS DEFENSE OR CLAIM TO PRESENT IF RELIEF IS GRANTED

In August, 1998 the Stovalls went to the Building Department with their plans and requested a permit. They were informed at this time by Michael August, Interim Building Director, and Mary Ann Howitt, Building Department Records Custodian that they did not need any permits for installation of their planned rain garden thereby granting the Stovalls permission to install such rain garden including a retaining wall as a part thereof.

The Stovalls proceeded with installation of the rain garden. On or about September 25, 1998, Streetsboro Law Director Martin wrote a letter to Building Director Gargas (See Exhibit "G" of Exhibit Appendix) which gave an opinion to the effect that a retaining wall is a structure for which a building permit is required under Section 1305.04 of the codified ordinances. Although the subject of the letter is "Retaining Walls" and the letter does not mention the Stovalls, the inference is that the Stovalls' rain garden retaining wall was the underlying target of the opinion. Thereafter, Mr. Gargas issued a Legal Notice of violations citing Code Sections 149.011 and 149.012, which were not part of the codified ordinances at

the time, and Code Sections 1127.03 and 1151.234. See copy of September 29 Legal Notice, Exhibit "H" of Exhibit Appendix); See Certified copy of the City's Codified Ordinances Chapter 149 reflecting that there were no Sections 149.011 and 149.012 in effect on 12/21/98 (Exhibit "I" of Exhibit Appendix).

December 7, 1998 the Stovall's again went to request a permit and while they were present, Dan Gargas said to Mike Freedburg that he would not grant a permit to anyone regarding the Stovall's property under any circumstances.

At the 12/21/98 Streetsboro City Council Meeting, the relevant portion of which was taped, with reference to the Stovalls claim, they were told they did not need a permit, a Gary Cross indicated a discussion with Mike August and Mary Ann Howitt in which they concurred that "that's probably what they told them." See Transcript of Taped minutes and Certified copy of Minutes for 12/21/98 Council Meeting, Page 9 quoting: "Mrs. Henzel explained the Building Department told them they could erect the wall without City involvement, however, the Law Director has since ruled a permit is required" (See Exhibit "J" of Exhibit Appendix).

At another meeting with the Building Department on April 9, 1999, Mike August admitted that he gave the Stovalls permission to erect the retaining wall. Those present at this meeting were Mike Freiberg, Hank Steining, Gary Wheeler, Mike August, Jerry Coulborne, Ray & Phyllix Stovall and the Stovall's then acting attorney, Robert Passov. See affidavit of Jerry Coulbourne and Affidavits of Phyllix & Ray Stovall, Exhibits "A", "B", and "C" of Attached Exhibit Appendix.)

Phyllix Stovall made record checks for building permits as to numerous retaining walls erected in the surrounding residential area and other yards including those the same or higher than the one installed in her yard. She was advised that there were and are no such permits issued for any of them. She further found that every property owner of every address below is Caucasian creating an inference of discrimination against the Stovalls by reason of race. The following is a list of them: (1) 2084 Deer Crossing; (2) 2090 Deer Crossing; (3) 2091 Deer Crossing; (4) 2074 Deer Crossing; (5) 2101 Deer Crossing; (6) 2094 Timber Ridge; (7) 2121 Timber Ridge; (8) 8660 Whitetail Ln; (9) 8670 Whitetail Ln; (10) 2034 Deer Meadows; (11) 2041 Deer Meadows; (12) 2002 Deer Meadows; (13) 8590 Deer Meadows; (14) 2110 Laurel Lane; (15) 2120 Laurel Lane; (16) 2130 Laurel Lane; (17) 2140 Laurel Lane; (18) 2150 Laurel Lane; (19) Fairfield Inn 9783 SR14; (20) 9567 Rte 14; (21) Straight Talk SR 14; (22) Poncho's & Lefty; (23) Rally's 9292 SR 14; (24) Second Nat. Bank 9269 State Rte 14; (25) City of Streetsboro, PD; (26) 2092 Deer Crossing; (27) 2106 Timber Ridge; (28) 2126 Timber Ridge; (29) 2171 Timber Ridge; (30) 2181 Timber Ridge; (31) 2191 Timber Ridge; (32) 2064 Deer Crossing; (33) 2061 Deer Crossing; (34) 2051 Deer Crossing; (35) 2024 Deer Meadows; (36) 2131 Laurel Lane; and (37) 2100 Laurel Lane.

B. MOVANT IS ENTITLED TO RELIEF UNDER ONE OF FIVE GROUNDS STATED IN RULE

In April, 2000, the Stovalls needed an attorney to represent them, since their first attorney desired to withdraw. Phyllix Stovall was referred to attorney Bruce

A. Brown through a business client, Bruce A. Brown's wife, who gave her Brown's business card and highly recommended him. The Stovall's immediately made an appointment with Mr. Brown to meet with him in his office. When they went to meet with him, they took the elevator to what appeared to them to be a large law firm occupying the thirteenth floor of the Bank One Building in downtown Cleveland, Ohio, i.e., the elevator opened only into the reception area of the law offices. They asked the receptionist for Mr. Brown and met with him in a conference room. During the meeting the Stovall's explained their legal situation and Mr. Brown assured them he could obtain favorable results for them. He told the Stovall's that he was licensed to practice in Ohio as well as in New York. The Stovall's were under the impression that Brown frequently traveled to New York for business as his secretary often represented that he was in New York when they called for him.

The Stovall's noticed that the first court documents filed on their behalf by Brown bore the name of Bruce P. Bogart as the attorney. The Stovall's questioned Mr. Brown on this and he informed them that Bogart was his partner. Brown explained that it was better to have two attorneys looking after their interests than one and also stated that Bogart was much more influential in Portage County than Brown and could likely obtain favorable results in their case more easily. Although the Stovall's never met Bruce Bogart face to face, on several occasions they spoke to a person that said he was Bruce P. Bogart on conference calls with Bruce A. Brown originating from his office.

Throughout the case, the Stovall's presented volumes of evidence to Bruce A. Brown for use in their

case. The Stovall's continuously questioned him on why he did not use affidavits and the evidence they presented to him and he repeatedly told them that certain things were not necessary, and assured them that it was a very simple case that he already had won. Brown stated that he was the attorney and knew what he was doing and they did not need to be worried about the case. The Stovall's trusted his ability because of his success in the previous matter he handled on their behalf, i.e., he successfully handled a mandamus action relating to this case on the Stovall's behalf.

Bruce A. Brown lost the Stovall's case at the trial level because he did not provide any appropriate evidence. He submitted no affidavits or other properly authenticated evidence and thus, the case and defenses of the Stovalls were never before this Court. Brown then appealed the case on behalf of the Stovall's and lost again for the same reason, incompetent representation. When during the appeal the issue of him not being a licensed attorney was raised, Bruce A. Brown assured the Stovall's that there was a case of mistaken identity with Bruce E. Brown and showed the Stovall's documentation relating to the disbarment of a Bruce E. Brown. Brown also stated it was part of an ongoing harassment created by the City of Streetsboro, that it was not materially relevant to the case and that they could say they were pro se to avoid the arguments.

The Stovalls began checking into Bruce A. Brown's background. Ultimately, an e-mail check with the Ohio Supreme Court reflects that Bruce P. Bogart was licensed to practice law during the pendency of this action until September 1, 2001, at which time his status became "NOT REGISTERED." Such checking further

reveals that Bruce A. Brown was never licensed to practice in the State of Ohio and that Bruce E. Brown, a different person, but the only "Bruce Brown" ever licensed, was disbarred in 1999 (See *Office of Disciplinary Counsel v. Brown*, (1999) 87 Ohio St.3d 316). To the shock of the Stovall's, further checking found the case of *State of Ohio v. Brown*, (8th App Dist., 1995), 108 Ohio App.3d 489, (discretionary appeal denied 664 N.E.2d 536 May 15, 1996), affirming conviction of Bruce A. Brown of 44 felony charges in connection with his holding himself out to be a licensed attorney, despite disbarment in New York and never being licensed to practice in Ohio.[2] The Ohio Office of Disciplinary Counsel is now investigating Mr. Brown regarding unauthorized practice of law in this matter.

The Stovall's were embarrassed and shocked to learn that this Mr. Brown had lied to them and fooled them all this time, that he had committed a fraud against them, and that his incompetence in not submitting their defense by way of affidavits and authenticated documents in opposition to the summary judgment motion was incompetent and the cause of them never being able to present their case to this court.

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[2] Ironically, one of the grounds for appeal by Bruce A. Brown, who was pro se in his criminal case, was regarding the Court ruling of not allowing admittance of an unauthenticated document as evidence.

C. THE MOTION IS MADE WITHIN REASONABLE TIME

Sometime after the August 22, 2001 Appellate Judgment, the Stovalls were notified that Bruce P. Bogart never represented them, that their appellant brief "was a forged document which was not written by a licensed attorney" and that the averments of Mr. Bogart's motion "also support the inference that the brief was the product of an illegal practice of law." Bruce A. Brown unrelentingly attempted to continue his fraud upon the Stovall's by trying to convince them there was a case of mistaken identity with him and a Bruce E. Brown who was in fact an Ohio attorney at one point and subsequently disbarred. Bruce A. Brown even attempted to solicit further funds from the Stovall's for him to represent them in a subsequent appeal to the Ohio Supreme Court. The Stovall's immediately began seeking new counsel to assist them as they continued to discover more shocking and confusing information. The within motion is filed within less than two weeks of the time when they were able to hire the undersigned counsel and complete substantial research regarding Bruce A. Brown including the findings that he was never licensed in Ohio, had been disbarred from New York since 1991 and had previously served four years in prison of a 20 year sentence for the unlawful practice of law. Given the gravity and complexity of the situation, it is fair to say that the Stovalls have made their motion as soon as practically possible and within a reasonable time.

The foregoing Statement of the Case and Facts are verified by the affidavits of Ray Stovall and Phyllix Stovall which are incorporated herein by reference. Such

facts are further supplemented by supplemental certifications and affidavits included in the Exhibit Appendix to the Brief, all of which are incorporated herein by reference.

III. LAW AND ARGUMENTS

This motion is for relief from the July 28, 2000 Judgment of this Court. Civ.R. 60(B) RELIEF FROM JUDGMENT OR ORDER, provides in pertinent part as follows:

> (B) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc*: On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. . . . The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

Civ.R.60, which governs motions for relief from judgment, is a remedial rule to be liberally construed

with a view for effecting a just result so that ends of justice may be served. *Kay v. Marc Glassman, Inc.* (Ohio 1996) 76 Ohio St.3d 18; hat is to be liberally construed. *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections* (Ohio 1993) 67 Ohio St.3d 134, 616 N.E.2d 869.

Civ R 60 is to be liberally construed to strike a balance between the ideas that it is desirable to bring an end to litigation and to see justice done. *Brown v. Akron Beacon Journal Publishing Co.* (Summit 1991) 81 Ohio App.3d 135, 610 N.E.2d 507, dismissed, jurisdictional motion overruled 63 Ohio St.3d 1404, 585 N.E.2d 426

Upon finding that the movant is entitled to relief from prior judgment, the court is ordinarily to vacate or suspend judgment pending trial on the merits of issues raised. *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections* (Ohio 1993) 67 Ohio St.3d 134.

Any doubt on a motion to vacate a default judgment should be resolved in favor of the motion so that cases may be decided on the merits. *Moore v. Emmanuel Family Training Center, Inc.* (Ohio 1985) 18 Ohio St.3d 64, 479 N.E.2d 879, 18 O.B.R. 96. Relief from judgment rule is a remedial rule that is to be liberally construed with a view to effecting a just result. *Wells v. Spirit Fabricating, Ltd.* (Ohio App.8 Dist. 1996) 113 Ohio App.3d 282, 680 N.E.2d 1046, dismissed, appeal not allowed 77 Ohio St.3d 1514, 674 N.E.2d 369.

To prevail on a motion for relief from judgment, the movant must satisfy three requirements and if any of

these three requirements is not met, the motion should be overruled, i.e., the Movant must establish that: (1) Movant has a meritorious defense or claim to present if relief is granted; (2) that movant is entitled to relief under one of grounds stated in the rule; and (3) that the motion is made within reasonable time and, where grounds of relief are one of first three subsections, not more than one year after the judgment, order or proceeding was entered or taken. *Morgan Adhesives Co. v. Sonicor Instrument Corp.* (Summit 1995) 107 Ohio App.3d 327; *S. Ohio Coal Co. v. Kidney* (Meigs 1995) 100 Ohio App.3d 661, appeal not allowed, 72 Ohio St.3d 1530.

A. MOVANT HAS A MERITORIOUS DEFENSE OR CLAIM TO PRESENT IF RELIEF IS GRANTED

The rain garden retaining wall is not in the nature of a fence wall for which a permit is required. Section 1333.04, Permit Exceptions, of the City's Code provides that "No permit shall be required for the following classes of excavation, grading, or filling operations . . . (d) . . . farming, gardening or similar agricultural use . . . (e) . . . raised flower beds . . . Landscaping, including mounds . . . (4) Other items as determined by the Building Director. The rain garden retaining wall slows down drainage to reduce erosion, but does not alter the drainage pattern. With the submission of the affidavits and certifications provided, there are clearly issues of material fact that should be addressed by a trial by the court. In particular, from the affidavits here provided, it is clear that City Officials told the Stovalls they did not need a permit for their rain garden including a retaining wall, although they deny it under oath. Rule 56(3) provides that a summary

judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

See also the reasons stated in the Affidvait of Phyllix Stovall, Exhibit "A-2" of the Exhibit Appendix.

B. MOVANT IS ENTITLED TO RELIEF UNDER ONE OF FIVE GROUNDS STATED IN RULE

Rule 60(B) states in pertinent part .... that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; .... or (5) any other reason justifying relief from the judgment . . ."

It is well established in Ohio by the Supreme Court decision in *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, that an attorney's actions are generally imputed to the Client. There are exceptions to this rule however. In *Scott v. Taps Lounge, Inc.,* 1991 WL 179439 (Ohio App. 4 Dist.), the Court found that in a case where an attorney completely abandoned a client that this action should not be imputed to the client and relief should be granted by 60(B)(5), "If counsel is negligent or dilatory and that negligence is imputed to the client, then there is no excusable neglect. But if the court in its discretion, based on the facts before it, decides not to make that imputation, then the neglect may be excusable.

The real question in this case is: Must a court always impute counsel's negligence to the client? We hold that it is not required to in every case. This is where the exercise of the court's discretion comes into play." Considering Bruce A. Brown fraudulently represented to the Court and to the Stovall's that Bruce Bogart was representing the Stovall's with him and that he was an attorney licensed in Ohio himself, this conduct cannot fairly be imputed upon the Stovall's. Bruce A. Brown committed his fraud against the Court and everyone in the case, not just the Stovall's.

In *Mayor v. WCI Steel, Inc., et al.,* 2001 WL 276976 (Ohio App. 11 Dist) the court stated, generally, once an attorney's actions depart the realm of "excusable neglect," his negligence in representing his client, whether it be simple or gross, must be imputed to his client. To treat an attorney's neglect of his duties to his client as grounds for relief from judgment, regardless of whether it was excusable or inexcusable, would eviscerate Civ.R. 60(B)(1) with respect to the phrase "excusable neglect." However, under certain circumstances of egregious conduct on the part of counsel, this court would not rule out the possibility that in the event an attorney had abandoned his client, Civ.R. 60(B)(5) would be applicable. Abandonment would occur if the attorney were prohibited from practicing law by a disciplinary committee, or if the attorney refused to respond to communications from his client and failed to perform any work on behalf of his client, in which case the client would be without scienter. In this case the Court then said in regard to an attorneys gross 'excusable neglect' that, "The appropriate remedy for such incompetence is a malpractice claim." *Id.* Brown's egregious, fraudulent conduct upon the Stovall's and this court has not left the Stovall's with the option of a malpractice claim

covered by malpractice insurance covering same as a remedy and thus the appropriate and the only available remedy would be relief from judgment by Ohio Civil rule 60(B)(5).

C. THE MOTION IS MADE WITHIN REASONABLE TIME

Motions pursuant to the fifth ground of Rule 60(B), "any other reason justifying relief from the operation of the judgment," must be brought within a reasonable time, but the provision is not limited by the one-year time limit governing the first three grounds under Rule 60(B). The fifth ground, based upon Federal Rule 60(b)(6), is intended as a catch-all provision. The provision reflects the inherent power of a court to relieve a person from the unjust operation of a judgment.

Since the Stovall's brought this motion as soon as practically possible upon the ongoing discovery of the fraud perpetrated upon the Court and upon themselves, i.e., within a few weeks time of uncovering the problem and retaining counsel licensed to practice in Ohio and further researching Bruce A. Brown, this motion should be considered to have been brought well within a reasonable amount of time.

D. THE COURT SHOULD SCHEDULE A HEARING

A trial court abuses its discretion in denying hearing on motion for relief from judgment where grounds for relief from judgment are sufficiently alleged and are supported with evidence which would warrant relief from judgment. *Kay v. Marc Glassman, Inc.* (Ohio 1996) 76 Ohio St.3d 18. An evidentiary hearing must be held where

a motion and affidavit for relief from judgment pursuant to *Civ. R 60(B)* contain sufficient allegations of operative facts to support a meritorious defense. *BancOhio Nat. Bank v. Schiesswohl* (Summit 1988) 51 Ohio App.3d 130. If the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under *Civ R 60(B)*, the trial court may grant a hearing to take evidence and verify the facts before it rules on the motion, and if it does not grant a hearing and overrules the motion without first affording an opportunity to the movant to present evidence in support of the motion, its failure to grant a hearing is an abuse of discretion. *Adomeit v. Baltimore* (Cuyahoga 1974) 39 Ohio App.2d 97.

IV. CONCLUSIONS

For the reasons stated, the Court should either grant the Stovalls' motion for relief from judgment, vacating the July 28, 2000 Judgment and scheduling the matter for trial or, in the alternative, the court should grant an order staying execution of such judgment and continuing the appeal bond pending hearing on the motion and scheduling said hearing.

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Attorneys for Defendants RAY
STOVALL & PHYLLIS STOVALL

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

CITY OF STREETSBORO	)	CASE No. 99 CV 0532
Plaintiff	)	JUDGE JOHN A. ENLOW
-vs-	)	
ENCORE HOMES, et al	)	
Defendants	)	

APPENDIX TO
DEFENDANT STOVALLS' MOTION FOR AN
ORDER GRANTING RELIEF FROM JUDGMENT

Exhibit **DESCRIPTION**

I. Affidavits and Deposition Excerpts:

A Affidavits of Phyllix M. Stovall, Defendant.

B Affidavit of Ray Cameron Stovall, Defendant.

C1 Affidavit of Jerry Coulbourne, J&S Construction Company.

II. Documents

D July 28, 2000 Judgement Entry (2 pgs.).

E August 22, 2001 Appellate Judgment Entry (5 pgs.).

F September 24, 2001 Appellate Judgment Entry (8 pgs.).

G Plaintiff's Attorney's Letter (4 pgs.) to Streetsboro & Building Department (9/25/98).

H Building Department Legal Notice (1 pg.) to Defendant (9/29/98).

I Certified copy of Chapter 149 of Streetsboro Codified Ordinances (6 pgs.).

J Transcript of Taped minutes and Certified copy of Minutes for 12/21/98 Streetsboro Council Meeting.

K Certified copy of Portage Soil and Water Conservation District file.

III. Unreported Cases:

L *Scott v. Taps Lounge, Inc.*, (Sept. 10, 1991) Ohio App. 4 Dist., unreported at 1991 WL 179439;

M *Mayor v. WCI Steel, Inc., et al.*, (March 16, 2001) Ohio App. 11 Dist., unreported at 2001 WL 276976.

Defs. Exh. "A-1"

STATE OF OHIO)
) SS. VERIFICATION
COUNTY OF CUYAHOGA)

PHYLLIX M. STOVALL, being first duly sworn according to law, deposes and says that:

1. She is one of the defendants in *City of Streetsboro v. Encore Homes et al*, Portage County, Ohio Common Pleas Court Case No. 99CV00532;

2. She has read the foregoing Motion for an Order Granting Relief from Judgment and the and Brief in Support thereof including the statement of the case and facts and he knows the contents hereof;

3. The factual statements contained in such motion and brief are of my own personal knowledge and true; and

4. Further Affiant Saith Naught.

/s/ Phyllix M. Stovall
PHYLLIX M. STOVALL

SWORN TO BEFORE ME, and subscribed in my presence this 8 day of November, 2001, at Euclid, Ohio.

/s/ Julie A. Fischer
Notary Public

JULIE A. FISCHER, Attorney at Law
Notary Public, State of Ohio
My Commission has no expiration date
Section 147.03 R.C.

Defs. Exh. "A-2"

AFFIDAVIT

BE IT KNOWN, that Phyllix M. Stovall, the Undersigned, being of legal age does hereby depose and say under oath as follows (or as set forth on the signed addendum annexed and incorporated herein):

My husband and I went to the Streetsboro Building Department for the purpose of obtaining a permit to construct a retaining wall at the rear of our property. When we asked Mike August for a permit his answer was that we didn't need one because retaining walls are considered a part of landscaping. He then asked Mary Ann Howitt to confirm his statement and she acknowledged that it was true, as the audiotape of the city council meeting on 12/21/98 will confirm "that is probably what they would have told them". The City of Streetsboro

cannot produce any documents governing retaining walls prior to our wall, nor was any landscaper registered or licensed before or now. Permits had never been issued for retaining walls.

We received a stop work order on 9/15/98 on our retaining wall. Upon returning to City Hall to find out what the problem was we were told by Dan Gargas that it was a gray area and he would set precedence with us. Two weeks later on 9/29/98 we were given legal notice that we were in violation of C.O.S. 149.011-C.O.S. 149.012 C.O.S. 1127.03 C.O.S. 1151.234.

We requested a true copy of the Codified Ordinance of Streetsboro, upon review we discovered that C.O.S. 149.011 and C.O.S. 149.012 did not exist at that time, C.O.S. 1127.03 was an ordinance governing lot requirements and not setbacks Section 1151.234 is a ordinance governing fences and wall like fences simply because a retaining wall cannot be opened to light and air.

As far as the matter of resolving this issue at the Board of Zoning and Appeals the City of Streetsboro scheduled hearings on several occasions and all were rescheduled or canceled. The city has a history of violating due process with us as well as their own city charter as is demonstrated by the newspaper article dated April 7, 1999, that published the public hearing to be held on April 20, 1999. Section 11.05 public hearing by council states council shall give at least thirty (30) days notice of the time and place thereof in a newspaper. If you don't need a permit, you don't need a variance, if you don't need a variance, you don't have to go before the Board of Appeals. The City did not follow the procedure of due process in that they did not allow a public hearing before they

commenced this Lawsuit. They have violated the Charter of the Municipality of Streetsboro Ohio:

Article XI: Planning and Zoning Commissions
Section 11.04
Section 11.05
Section 11.06
Article XII: Board of Zoning & Building Appeals
Section 12.03
Section 12.05

The fact that prior to our wall the city can show no documents required for topography changes, retaining walls, or for that matter amended permits for landscaping of residential properties attest to the fact that these laws are only being applied to us. The City has since passed laws governing retaining walls because of our wall.

We are exempt from C.O.S. 901.03 because we are installing a bio-retention rain-garden, and were working under a duly issued building permit. C.O.S. 901.04 (a) and shall not be constructed as prohibiting or limiting the lawful use of land 901.04 (d) C.O.S. Section 1103.02 (108) and C.O.S. Section 1103.02 (115) are (1999 replacement) and did not pertain to our wall in 1998. Planning and Zoning Code 1107.01 is not applicable to retaining walls now and has never been in the past, there is no documentation of a retaining wall falling under this ordinance.

Witness my hand under the penalties of perjury this 31st day of October, 2001.

/s/ Phyllix M. Stovall
Signature

State of Ohio

County of Cuyahoga

Then personally appeared Phyllix M. Stovall, who acknowledged the foregoing, before me.

/s/ C.R. Gray
Notary Public
My Commission Expires:

Defs. Exh. "B-1"

STATE OF OHIO)
) SS. VERIFICATION
COUNTY OF CUYAHOGA)

RAY CAMERON STOVALL, being first duly sworn according to law, deposes and says that:

1. He is one of the defendants in *City of Streetsboro v. Encore Homes et al,* Portage County, Ohio Common Pleas Court Case No. 99CV00532;

2. He has read the foregoing Motion for an Order Granting Relief from Judgment and the and Brief in Support thereof including the statement of the case and facts and he knows the contents hereof;

3. The factual statements contained in such motion and brief are of my own personal knowledge and true; and

4. Further affiant Saith Naught

/s/ Ray Cameron Stovall
RAY CAMERON STOVALL

SWORN TO BEFORE ME, and subscribed in my presence this 5 day of November, 2001, at Euclid, Ohio.

/s/ Julie A. Fischer
Notary Public

JULIE A. FISCHER, Attorney at Law
Notary Public, State of Ohio
My Commission has no expiration date
Section 147.03 R.C.

Defs. Exh. "C"

AFFIDAVIT

BE IT KNOWN, that Jerry Coulbourne, the Undersigned, being of legal age does hereby depose and say under oath as follows (or as set fourth on the signed addendum annexed and incorporated herein):

1. At the April 9, 1999 meeting Mike August admits that he gave the Stovalls permission to erect the wall.

2. Mike August stated that permits were not required for retaining walls they are considered a part of landscape.

3. The attendants at this meeting were as follows:

Mike Freiberg	Ray & Phyllix Stovall
Hank Steining	Mike August
Gary Wheeler	Attorney Robert Passov,
	Jerry Coulbourne.

4. Mike August and all attendants decided that the appeals hearing should be canceled, due to an attempted resolution by everyone at the meeting.

5. Encore Homes would approve access to the rear yard for the purpose of rebuilding the retaining wall.

6. Sally Henzell had given permission to continue work and complete the wall 1.5 ft behind the property line to ensure the Weisman's closing.

Witness my hand under the penalties of perjury this 2nd day of November, 2001.

/s/ Jerry D. Coulbourne
Signature

State of Ohio

County of Portage November 2, 2001

The personally appeared Jerry Coulbourne, who acknowledged the foregoing, before me.

/s/ Elizabeth A. Speers
Notary Public
My Commission Expires:

ELIZABETH A. SPEERS
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES
MARCH 26, 2004

STATE OF OHIO

COUNTY OF PORTAGE, ss

IN THE COURT OF COMMON PLEAS

CITY OF STREETSBORO,

Plaintiff

CASE NO. 99 CV 532

-v-

ENCORE HOMES, et al.,

Defendant

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 31st day of December, 2001, in the Portage County Common Pleas Court, Ravenna, Ohio, before the Honorable John A. Enlow, the appearances listed having been made, the following proceedings were had:

* * *

[24] A Yes.

Q With regard to Bruce Bogart?

A Yes.

Q And did that reflect that he was not registered as of 9/1/2001?

A Yes.

Q As a matter of fact, Bruce Brown, Andrew Brown said he was mistaken for Bruce E. Brown, is that right?

A Yes.

Q But that he was registered?

A Yes.

Q Did we inform you of the case of State of Ohio versus Brown in which he was convicted of 44 felony charges in connection with his holding himself out to be a licensed attorney despite disbarment in New York and never being licensed to practice in Ohio?

A Yes.

Q Had you known about that before?

A No.

Q Mrs. Stovall, had you paid for the services of this Bruce Brown?

A About $12,000.

Q $12,000? Do you feel you have been [25] injured by his conduct in this case?

A Defrauded, cheated.

Q Pardon?

A Defrauded cheated, embarrassed. Injured, yeah.

Q Do you feel you had your day sin Court under this summary judgment motion with the representation that was provided by Bruce Brown?

MR. MURDOCK: Objection.

A Never had our day in Court.

THE COURT: I'll sustain.

Q Do you feel you had your day in Court under the summary judgment motion?

A I never had a day in Court.

MR. MURDOCK: Objection.

THE COURT: Overruled.

Q In addition to the information you were provided by our office, did you have any contact with the Disciplinary Office from the Ohio Supreme Court?

A Yes. I contacted the Ohio Disciplinary Counsel and they sent me the forms to file a complaint on it and they also informed me to go to the Prosecutor's Office.

Q Were you subpoenaed to a Grand Jury?

* * *

[31] THE COURT: I thought this was your ten minutes of argument. I thought you already put in all the exhibits you want.

MR. FISCHER: This has to do with the Defense, one exhibit which is the – excuse me, one more. Exhibit E which is 1333.04.

Your Honor, when the Court of Appeals received this case, as you well know the Court of Appeals made a decision based on the record that is before this case. The error that we present today, the circumstances with regards to this attorney fraud was not in the record at that time, therefore, the Court of Appeals could not rule on it. We believe that the Court of Appeals, we believe that you made the decision that only you could make at that time when there were no certifications or affidavits from the – from Bruce Brown or Bogart or whose ever name is on these pleadings and the Court of Appeals had to sustain you. There was no abuse of discretion because there was

no evidence before you representing the Stovalls, they didn't have their day in Court. Get to the Court of Appeals, they take this on a pro se basis based upon the bogus brief of the [32] attorney or non attorney that claimed to be one and what could the Court of Appeals do? No certifications, no affidavit. Has to sustain you.

We're not asking you to overrule the Court of Appeals. If we wanted to have the Court of Appeals overruled we would have appealed to the Ohio Supreme Court. We didn't appeal to the Ohio Supreme Court because there was no ground, there was no error. The error had to be in this Court. At the time the decision was made, was not before this Court, hasn't been before this Court until today when we pointed out what happened. I know the law is you have an attorney, that many and a lot of things are imputed. We cited a couple of cases that where there is abandonment, this rule does not apply but we don't have an attorney, we have a non attorney that defrauded these people out of $14,000 and didn't present the case as a lawyer would, didn't present certifications and affidavits and lost the case. We do have a viable defense if this case is reopened.

Section 1333.04 provides exceptions to permit for a retaining wall excavation, grading

* * *

[34] some building departments are more stickler about it than others and Streetsboro did not require these changes.

We'll be able to present evidence to show that the neighbors in the immediate vicinity of Stovalls installed, had filled and graded and installed retaining walls and, in fact, there was one installed after, I think within the last

year and there was no permit issued. We have the certified building department copy. We have photographs of the – of the wall itself. This has been a – a rule, an application to the Stovalls only. Everybody else has installed a structure of this kind has not been required to have a permit. We do definitely have a defense.

As far as the case being brought in a reasonable time, we look at it for the first time in October, around October fifth trying to decide whether or not these people had an appeal to the Ohio Supreme Court and obviously if there is no error appearing at this Court level, this end, the Court of Appeals has to be right and there is nothing to appeal to the Ohio Supreme Court. There is the only remedy

* * *

[40] Appeals could have fashioned a remedy to take care of this is ludicrous. They had no authority, there was no error made by this Court, no error brought to this Court's attention until today. Not only an error, a gross misjustice to these people, defrauded and cheated out of having a day in Court. That is all we're asking. We're talking about one summary judgment, not three years' litigation, opportunity to respond to it in a professional manner with applications and proof that the Stovalls are correct in their position.

Thank you, your Honor.

THE COURT: I'll have to look at the exhibits.

Stand adjourned.

BAILIFF: All rise.

Defendants Exh. "H"
Submitted at 12/31/2001 Hearing

AFFIDAVIT

State of Ohio :
: ss
Summit County :

I, Lily P. Aaron, being duly affirmed, state as follows:

1. I am the Public Information Specialist for the State of Ohio Environmental Protection Agency's Northeast District Office (NEDO). In that capacity and during the course of public file reviews, I have access to and custody of Ohio Environmental Protection Agency Division of Surface Water files. Files, which have been created or received by the Ohio Environmental Protection Agency (Ohio EPA), contain documents regarding Deer Meadow II Subdivision, located at 7300 Whipple Avenue, N.W., located in the City of Streetsboro – Portage County, Ohio.

2. On November 02, 2001, I inspected and reviewed the Ohio EPA Deer Meadow II Subdivision (Streetsboro – Portage County, 1994 to Present) file. The records are kept in the ordinary course of Ohio EPA's regularly conducted activity pursuant to Chapter 6111 of the Ohio Revised Code.

3. I hereby certify and attest that the attached documents is a true and accurate copy of records which has been received by the Ohio Environmental Protection Agency. This file is kept in the normal course of the State of Ohio Environment Protection Agency's regularly conducted activities.

Further, affiant sayeth naught.

/s/ Lily P. Aaron — Nov. 6, 2001
Lily P. Aaron — Date

Affirmed to before me and subscribed in my presence this 6 day of November, 2001.

/s/ Carol L. Haywood
Notary Public

CAROL L. HAYWOOD, Notary Public
Residence – Summit County
State Wide Jurisdiction, Ohio
My Commission Expires

My commission expires on March 26, 2008

City of Streetsboro

Engineering Department
9184 State Route 43 **(LOGO)** (330) 626-4942
Streetsboro, OH 44241 Fax: (330) 626-4035

August 4, 2000

Mr. H.B. Steining
Drees Homes
7300 Whipple Avenue
North Canton, Ohio 44720

Ref: Deer Meadow – Phase II
Drainage Problems – Stovall Property – Block Wall

Dear Mr. Steining:

On August 1, 2000, the City received a copy of the decision from the Court of Common Pleas, Portage County, in the matter of "City of Streetsboro v. Encore Homes". This is the case involving Mr. & Mrs. Stovall's block wall at the back of their property.

The Court has found in favor of the City of Streetsboro, and has ordered that the wall is to be removed.

Once the wall is removed, and the land returned to the contours of the approved plans, a condition of flooding and erosion will then exist. This will cause more problems for the residents of Deer Meadow Blvd.

My letter of July 20, 2000 explains the position of both the City and the Ohio E.P.A. concerning both existing drainage problems and those that will exist when the wall is removed.

In addition, a letter dated May 4, 2000, from Drees Homes, states that your company was willing to contribute to the installation of "*pipe to handle the runoff from the*

downspouts from the Stovall residence over the adjoining properties to an appropriate outlet." This clearly indicates that your company acknowledges that a problem will exist and that the solution you propose is *exactly* what the City has asked for. The placement of a yard drain merely provides the adjoining residents a point to direct any excess water that they now experience in their yards.

Based on the above points, the City is requiring Drees Homes to perform the work as outlined in our June 15th letter. This matter has continued for far too long and there is no longer any reason to postpone what needs to be done.

As previously agreed, all costs for the work will be the responsibility of Drees Homes, and are not to be shared by the homeowners.

If you have any questions, or wish to discuss any of the above items, please feel free to contact me at 330-626-4942.

Sincerely,

/s/ Bruce J. Terrell
Bruce J. Terrell
Engineering Department

Cc: Dan Bogoevski – Ohio E.P.A.

IN THE COURT OF APPEALS ELEVENTH DISTRICT
PORTAGE COUNTY, OHIO

CITY OF STREETSBORO Plaintiff-Appellee v. RAY STOVALL PHYLLIX STOVALL ET AL Defendant-Appellant	Appeals Court No. 2002-P-0018 On Appeal from Portage County Common Pleas Court Case No. 99CV532

BRIEF OF APPELLANTS
(Oral Hearing Requested)
(Filed May 24, 2002)

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THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW BY DENYING THE STOVALL'S MOTION FOR RELIEF FROM JUDGMENT AND RULING THAT THE STOVALL'S NEW EVIDENCE DID NOT PRESENT A MERITORIOUS CLAIM SINCE THE STOVALL'S WERE NOT REQUIRED TO PROVE A MERITORIOUS CLAIM BUT THAT THEY WOULD HAVE ONE, IF GIVEN THE OPPORTUNITY TO PRESENT IT

First issue presented for review and argument:

Did the Trial Court abuse its discretion and commit reversible error by denying the Stovalls' motion for relief from judgment for failure to "present a meritorious defense to the claim sought to be vacated?"

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STATUTES AND CONSTITUTIONAL PROVISIONS

Streetsboro

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I. STATEMENT OF CASE

A. NATURE OF CASE

This case is about Defendants RAY & PHYLIX STOVALL (the "Stovalls"), home owners and tax paying citizens of the Plaintiff CITY OF STREETSBORO (the "City"), the County of Portage, and the State of Ohio who have twice been denied their day in court, i.e., due process. and equal protection of the law.

After all efforts to get of correction of a chronic flooding and erosion problems causing damage to their new home and lot failed, the Stovalls went to the Portage Soil and Water Conservation District, which recommended installation of a botanical rain garden including a retaining wall. In August, 1998, after seeking necessary permits from the City Building Dept. and being told that none were required, the Stovalls installed the botanical rain garden.

After the Stovalls installed the rain garden, the City began asserting, as in the case below and otherwise, that the Stovalls did need permit(s), while permitting scores of other similarly situated retaining walls to be installed both before and after the Stovalls' installation without requiring a permit, thereby denying the Stovalls equal protection of the laws. The Stovalls were first denied their day in court and due process of law in that they were defrauded and incompetently represented by an imposter non-attorney who represented himself as a licensed attorney. The imposter took no depositions and filed no affidavits, certified documents, or other Civ. R. 56(C) evidence with the court inopposition to the City's Summary Judgment Motion. After the imposter appealed the trial court's July 28, 2000 Judgment granting summary

judgment and ordering the Stovalls to remove the rain garden, in August, 2001, the Stovalls learned of the fraudulent representation problem from this Court of Appeals, which later sustained the trial court's judgment on September 24, 2001, reasoning that the decision was based upon the only Civ. R. 56(C) evidence in the record, that which was filed by the City.

The Stovalls' were denied their day in court and due process a second time on January 31, 2002, when the trial court denied their Civ. R. 60(B) Motion for Relief from judgment and an opportunity to defend against the City's summary judgment motion represented by a licensed attorney, one who would take depositions and file them together with affidavits and certified documents to present their case. The appeals is from the 1/31/02 Judgment.

B. PROCEDURAL POSTURE

The Complaint (R-0001) for injunctive relief to force the Stovalls to remove a rain garden installed in their rear yard was filed on June 24, 1999. Plaintiff's Amended Complaint (R-0011) was served upon the Stovalls on November 3, 1999 (R-0026) and Answered 12/6/99 (R-0031).

On 4/20/00, the Notice of Appearance of alleged substitute Counsel Bruce Bogart, on behalf of the Stovalls was filed (See R-0043). As it turned out, however, the person actually filing the Entry of Appearance was **Bruce Andrew Brown** (**the "imposter"**), who wasd not a licensed attorney in the State of Ohio who did not have permission from Bruce Bogart, a licensed attorney at the time, to file papers in court using and signing his name thereon.

The city's Summary Judgment Motion (See R-0046 & R-0053) supported by affidavits and certified documents was filed. Mr Brown thereafter filed the Stovall's Opposition to the City's Motion (R-0050), fraudulently representing it as a document signed by attorney Bruce Bogart, and incompetently submitting it without any affidavits or other Civ. R. 56(C) evidence in support thereof to raise any issue of fact and with essential facts including without limitation the failure to even mention Section 1333.04 of the City's Codified Ordinances which exempted the Stovalls' rain garden installation from any permit required for excavation, grading, or filling.

The Court granted the City's Motion on 7/28/00 (R-0071, the "7/28/00 Judgment") ordering an injunction to the Stovalls to remove the wall placed at the back of their property.

After Mr. Brown, posing as Attorney Bogart, filed a Notice of Appeal (R-0078) on August 15, 2000, which was docketed as Eleventh District Case No. 2000-P-0089 (the "2000 Appeal"), a judgment was entered on August 22, 2001 (JR0033, Pg. 1087) granting Attorney Bogart's motion to remove his name as counsel of record, noting at page 2 thereof that:

> Needless to say, forgery and the illegal practice of law are serious matters, which have criminal implications; accordingly, these matters should be investigated by the appropriate officials in Portage County.

The judgment gave the Stovalls the options of hiring a new attorney or letting the matter proceed on the briefs filed *pro se* within 20 days. Since, the Stovalls were unable to

locate a new attorney before the case proceeded as if *pro se* by default.

This Court of Appeals rendered its decision in the 2000 Appeal (R-0101, 9/24/01 & JR0033, Page 1259) upholding the trial court. At pages 5 and 6 of the opinion, this Court of Appeals made clear the basis for its decision, i.e., that the Stovalls did not state specific facts as required by Civ.R. 56(C) and no evidence or stipulation may be considered except as stated in this rule. . . .

No appeal was taken to the Ohio Supreme Court. Instead, a Motion for Relief from Judgment (R-0102) was filed at the trial court, urging for the *first time in the record that the Stovalls had been defrauded, denied their day in court, due process,* etc., as soon as possible after the Stovalls secured new Counsel. At the hearing scheduled on December 31, 2001, the Court indicated that each side would have Ten Minutes each side to argue the motion. (Transcript Page 2, Line 17; R-0120). Although the Court indicated that evidence could be presented when asked (Tr-2, Line 24; R-0120), after a minor amount of testimony was taken from witness Jerry Coulbourn, the Court called counsel to the bench (Tr-9, Line 12; R-0120) and indicated "off the record" that the testimony would have to be limited to one phase or another and that the balance of the motion would be limited to argument.

The hearing proceeded with testimony from Defendant Phylix Stovall who testified how the Stovalls were deceived and defrauded by the non-attorney imposter (Tr-10 et seq; R-0120). She stated that "We knew we had a mound of evidence that wasn't being used and he wasn't supporting the case. We had written affidavits ourselves and had given him the affidavits and he wouldn't use

them." (Tr-18, Line 25 et seq.; R-0120). When confronted regarding personally contacting the Court of Appeals: "He (Mr. Brown) told us not to do that, that they – that they wouldn't discuss it with us, we would have to have an attorney. So we started searching for an attorney immediately. (Tr-21, Line 16 et seq.; R-0120). She testified that the Stovalls paid imposter Brown $12,000 for legal services and they had been defrauded, cheated, and deprived of their day in court by him (Tr-24, Line 22 et seq.; R-0120). The Stovalls were unable to locate an attorney to represent them until after October 5, 2001 (Tr-22, line 14; R-0120)

Under the limiting circumstance laid out by the court, the Stovalls had already discontinued Mr. Coulbourne's testimony and did not present further witnesses (Tr-30, Line 7 et seq.; R-0120), but further introduced and submitted the following Exhibits: *Exhibit "B"* documenting that the Stovalls had no attorney and were defrauded by non-attorney, Mr. Brown; *Exhibit "E"* including a certified copy of Streetsboro Codified Ordinances "exemption" Section 1333.04; and *Exhibit "H"* a OEPA certification of Streetsboro City Engineer's letter admitting that the Stovalls' rain garden retaining wall was functioning as designed to reduce flooding and erosion, i.e., if removed "a condition of flooding and erosion will then exist . . . cause more problems for the residents of Deer Meadow Blvd." After arguments, the case was taken as heard and submitted by the Trial Court.

C. DISPOSITION BELOW

The Trial Court denied the Stovalls Motion for relief from judgment on 1/31/02 (R-0114, the "1/31/02 Judgment")

for failure to "present a meritorious defense." The judgment was silent regarding establishing one of the Civ.R.60(B) grounds and whether the motion was brought within a reasonable time. The Stovalls are here appealing from the 1/31/02 Judgement.

II. STATEMENT OF FACTS

The home of the Stovalls, black persons, is located at 2082 Deer Crossing in the Deer Meadow Subdivision, City of Streetsboro, County of Portage, and State of Ohio, and was built in 1996 pursuant to a building permit along with other homes in accordance with drainage plans approved by the City. From the start, the Stovalls excessive erosion and gullies, especially in their rear yard, was encountered. They communicated *inter alia* with the Drees Company, the City, the neighborhood association, the Ohio EPA ("OEPA"), and the Portage Soil and Water Conservation District ("PSWCD") get corrective action without any success. PSWCD recommended gardening, in particular installation of a bioretention structure commonly referred to as a "rain garden" to arrest and control the Stovalls' chronic erosion problem. This entailed installation of a "V" shaped retaining wall oriented and located with the large opening of the wall at the top of the rear slope pointing downward and filled with top soil and plantings in and around the wall to act as a retention device to slow down the rate of flowing water during a storm to the point that erosion and flooding are substantially reduced or eliminated.

A. MOVANT HAS A MERITORIOUS DEFENSE OR CLAIM TO PRESENT IF RELIEF IS GRANTED

In August, 1998, when the Stovalls went to the Building Department with their plans and requested a permit, they were *informed* by Michael August Interim Building Director, and Mary Ann Howitt, Building Department Records Custodian that *they did not need any permits for installation of their planned rain garden thereby granting the Stovalls permission to install such rain garden including a retaining wall as a part thereof.* The Stovalls proceeded with installation of the rain garden. But, the City shut down work on the rain garden, claiming that a permit was in fact needed. When the Stovall's went to request a permit and while they were present, on 12/7/98, Dan Gargas told Mike Freedburg that he would not grant any permit to the Stovall's property under any circumstances.

At the 12/21/98 Council Meeting Streetsboro Mayor Henzel, referring to Appellant Phylix Stovall, stated that ". . . this is the lady that came to the Building Dept. and was told it was ok to put up a wall. A Retaining Wall that we have no documentation or laws governing it. So she went ahead and did it and now there's a problem." Gary Cross then stated: "And Mary Ann and Mike concur that that's what they would have told them." These are excerpts transcribed from a certified copy of the tape recording of the December 21, 1998 meeting. (See R-0103, Exhibit J-1, Addendum to Exhibit Appendix filed 11/13/01). See also Certified Minutes at Page 9 quoting: Mayor Henzel (See Exhibit "J" of Exhibit Appendix to Motion, R-0102).

At a meeting with the Building Department on 4/9/99, Mike August admitted that he gave the Stovalls permission to erect the retaining wall. Those present at this meeting were Mike Freidberg, Hank Steining, Gary Wheeler, Mike August, Jerry Coulborne, Ray & Phyllix Stovall and the Stovall's then acting attorney, Robert Passov. (See affidavit of Jerry Coulbourne and Affidavits of Phyllix & Ray Stovall, Exhibits "A", "B", and "C" of Attached Exhibit Appendix. to Motion for Relief from Judgment, R-0102).

Section 1333.04 of the Codified Ordinances clearly exempted the Stovalls' bioretention rain garden from Permit Requirements as did Section 901.04, providing that no permit shall be required for excavation, grading, or filling operations including gardening.

Phyllix Stovall made record checks for building permits at the Building Department re numerous retaining walls she noted were erected in the surrounding residential area including those the same or higher than the one installed in her yard. She was advised that there were and are no such permits issued for any of them. She further found that every property owner of every address below is Caucasian creating an inference of discrimination against the Stovalls by reason of race. The following is a list of them: (1) 2084 Deer Crossing; (2) 2090 Deer Crossing; (3) 2091 Deer Crossing; (4) 2074 Deer Crossing; (5) 2101 Deer Crossing; (6) 2094 Timber Ridge; (7) 2121 Timber Ridge; (8) 8660 Whitetail Ln; (9) 8670 Whitetail Ln; (10) 2034 Deer Meadows; (11) 2041 Deer Meadows; (12) 2002 Deer Meadows; (13) 8590 Deer Meadows; (14) 2110 Laurel Lane; (15) 2120 Laurel Lane; (16) 2130 Laurel Lane; (17) 2140 Laurel Lane; (18) 2150 Laurel Lane; (19) Fairfield Inn 9783 SR14; (20) 9567 Rte 14; (21) Straight Talk SR 14; (22) Poncho's & Lefty; (23) Rally's 9292 SR 14;

(24) Second Nat. Bank 9269 State Rte 14; (25) City of Streetsboro PD; (26) 2092 Deer Crossing; (27). 2106 Timber Ridge; (28) 2126 Timber Ridge; (29) 2171 Timber Ridge; (30) 2181 Timber Ridge; (31) 2191 Timber Ridge; (32) 2064 Deer Crossing; (33) 2061 Deer Crossing; (34) 2051 Deer Crossing; (35) 2024 Deer Meadows; (36) 2131 Laurel Lane; and (37) 2100 Laurel Lane (See affidavit of Phyllix Stovall, Exhibit "A" of Attached Exhibit Appendix to Motion for Relief from Judgment, R-0102).

B. MOVANT IS ENTITLED TO RELIEF UNDER CIV. R. 60(B)

In April, 2000, the Stovalls needed an attorney to represent them, since their first attorney desired to withdraw. Phyllix Stovall was referred to attorney Bruce A. Brown through a business client. When they went to meet him, they took the elevator to what appeared to them to be a large law firm occupying the thirteenth floor of the Bank One Building in downtown Cleveland, Ohio, i.e., the elevator opened only into the reception area of the law offices. They asked the receptionist for Mr. Brown and met with him in a conference room. Mr. Brown assured them he could obtain favorable results for them and that told them that he was licensed to practice.

When the Stovall's noticed that the first court documents filed on their behalf by Brown bore the name of attorney Bruce P. Bogart, they questioned Brown and he informed them that Bogart was his partner and further that Bogart was much more influential in Portage County than he and could likely obtain favorable results more easily. Although the Stovall's never met Bruce Bogart face to face, on several occasions they spoke to a person who

said he was Bruce P. Bogart on conference calls with Bruce A. Brown originating from his office.

Throughout the case, the Stovall's presented evidence to Bruce A. Brown for use in their case. When the Stovall's questioned why he did not use affidavits and evidence they presented, he repeatedly told them it was not necessary, assuring them that it was a very simple case that he already had won. He stated that he was the attorney and knew what he was doing.

Imposter Bruce A. Brown lost the Stovall's case at the trial level because he incompitently did not provide any Civ.R. 56(C) evidence and the case and defenses of the Stovalls never came before the trial or appeals Court. When during the appeal the issue of him not being a licensed attorney was raised, Bruce A. Brown assured the Stovall's that there was a case of mistaken identity with Bruce E. Brown and showed the Stovall's documentation relating to the disbarment of a Bruce E. Brown. Imposter Brown stated it was part of an ongoing harassment created by the City of Streetsboro, that it was not materially relevant to the case, and that they could say they were pro se to avoid the argument and time ran out for exercising their options.

An e-mail check with the Ohio Supreme Court reflected that Bruce P. Bogart was licensed to practice law during the pendency of this action until September 1, 2001, at which time his status became "NOT REGISTERED." Such checking further revealed that Bruce A. Brown was never licensed to practice in the State of Ohio, and that a Bruce E. Brown, a different person, but the only "Bruce Brown" ever licensed, was disbarred in 1999 (See *Office of Disciplinary Counsel v. Brown*, (1999) 87

Ohio St.3d 316).[1] To the shock of the Stovall's, we found the case of *State of Ohio v. Brown*, (8th App Dist., 1995), 108 Ohio App.3d 489, (discretionary appeal denied 664 N.E.2d 536 May 15, 1996), affirming conviction of Bruce A. Brown of 44 felony charges in connection with his holding himself out to be a licensed attorney, despite disbarment in New York and never being licensed to practice in Ohio. The Ohio Office of Disciplinary Counsel is now investigating Mr. Brown regarding unauthorized practice of law in this matter.

The Stovall's were devastated to learn how Mr. Brown had lied to them, fooled them all this time, committed a fraud against them, and his incompetence in not properly submitting their defense.

C. THE MOTION IS MADE WITHIN A REASONABLE TIME

Sometime after the August 22, 2001 Appellate Judgment, when the Stovalls were notified that Bruce P. Bogart never represented them, that their appellant brief "was a forged document which was not written by a licensed attorney" and that the averments of Mr. Bogart's motion "also support the inference that the brief was the product of an illegal practice of law." Bruce A. Brown unrelentingly attempted to continue his fraud upon the Stovall. But the Stovall's immediately began seeking new counsel to assist them as they continued to discover more

[1] Ironically, one of the grounds for appeal by Bruce A. Brown, who was pro se in his criminal case, was regarding the Court ruling of not allowing admittance of an unauthenticated document as evidence.

shocking and confusing information. The within motion is filed within less than two weeks of the time when they were able to hire the undersigned counsel and complete substantial research regarding Bruce A. Brown including the findings that he was never licensed in Ohio, had been disbarred from New York since 1991 and had previously served four years in prison of a 20 year sentence for the unlawful practice of law. Given the gravity and complexity of the situation, the Stovalls made their motion as soon as practically possible and within a reasonable time.

III. ARGUMENT

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW BY DENYING THE STOVALL'S MOTION FOR RELIEF FROM JUDGMENT AND RULING THAT THE STOVALL'S NEW EVIDENCE DID NOT PRESENT A MERITORIOUS CLAIM SINCE THE STOVALL'S WERE NOT REQUIRED TO PROVE A MERITORIOUS CLAIM BUT THAT THEY WOULD HAVE ONE, IF GIVEN THE OPPORTUNITY TO PRESENT IT

First Issue presented for review and argument

Did the Trial Court abuse its discretion and commit reversible error by denying the Stovalls' motion for relief from judgment for failure to "present a meritorious defense to the claim sought to be vacated?"

A. MOVANT HAS A MERITORIOUS DEFENSE OR CLAIM TO PRESENT IF RELIEF IS GRANTED

The Stovalls have a meritorious defense to present, if given the opportunity. In the January 31, 2002 Judgment

Entry (R-0114) the Trial Court stated as its reasons for denying the Motion for Relief from Judgment that:

> In filing their motion and at hearing the Stovalls offer nothing new in the way of a meritorious defense to this judgment. All the *material* facts alleged now by the Stovalls were alleged in the previous proceedings in this Court and to the Court of Appeals. None of these facts present a meritorious defense to the claim sought to be vacated.

But, this a *non sequitur* and clearly incorrect, because in ruling on Plaintiff's Summary Judgment Motion (R-0071) the Trial Court in its judgment entry (R-0071) made it crystal clear that it was not considering facts, arguments, and defenses not supported by Civ.R.56(C) evidence, to wit:

> .The **Civ.R. 56(C) evidence** submitted shows that the Stovalls constructed a retaining wall at the rear of their property without the necessary grading and building permits . . . Upon review . . . and construing the **Civ.R. 56(C) evidence** in favor of the Stovalls, the Court concludes that Streetsboro is entitled to judgment as a matter of law.

Furthermore, new facts were stated, e.g., the impact of Codified Ordinances Section 1333.04, which was never cited, argued, considered, or even mentioned by anyone in any document filed in the Trial Court or Court of Appeals until 11/8/01 in the Stovalls' Motion (R-0102).

In the 7/28/00 Judgment, the court ignored and gave no credence or mention to any of the arguments asserted by Mr. Brown. Why? Because Mr. Brown had submitted no

Civ.R. 56(C) evidence for the Court to construe and nowhere did the Court cite Section 1333.04.

The rain garden retaining wall is not in the nature of a fence wall for which a permit is required. Section 1333.04, Permit Exceptions, of the City's Code provides that "No permit shall be required for the following classes of excavation, grading, or filling operations . . . (d) . . . farming, gardening or similar agricultural use . . . (e) . . . raised flower beds . . . Landscaping, including mounds . . . (4) Other items as determined by the Building Director. The rain garden retaining wall slows down drainage to reduce erosion, but does not alter the drainage pattern.

With the submission of the affidavits and certification provided, there are clearly issues of material fact that should be addressed by a trial by the court. In particular, from the affidavits here provided, it is clear that City Officials told the Stovalls they did not need a permit for their rain garden including a retaining wall, although they later denied it under oath.

See also the reasons stated in the Affidavit of Phyllix Stovall, Exhibit "A-2" of the Exhibit Appendix to Motion for Relief from Judgment (R-0102).

Clearly, the Trial Court did not consider and rule on the Stovall arguments before, because they were not before the court supported by Civ. R. 56(C) evidence. Now when the facts are asserted by affidavits and certifications and a code section not previously considered is brought to the court's attention, the Trial Court summarily holds with no explanation that none of the supported facts present a "meritorious defense to the claim sought to be vacated" is untenable.

B. MOVANT IS ENTITLED TO RELIEF UNDER CIV. R. 60(B) & MADE THE MOTION WITHIN A REASONABLE TIME

It must be assumed that the Stovalls demonstrated to the Court's satisfaction that they were entitled to relief under one of the Civ.R.60(B) grounds, i.e., the 5th ground, and that the motion was brought within a reasonable time, since the judgment entry did not specify otherwise.

We have found no cases directly on point. But, it is well established in Ohio by the Supreme Court decision in *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, that an attorney's actions are generally imputed to the Client. There are exceptions to this rule however. In *Scott v. Taps Lounge, Inc.*, 1991 WL 179439 (Ohio App. 4 Dist.), the Court found that in a case where an attorney completely abandoned a client that this action should not be imputed to the client and relief should be granted by 60(B)(5),

> "If counsel is negligent or dilatory and that negligence is imputed to the client, then there is no excusable neglect. But if the court in its discretion, based on the facts before it, decides not to make that imputation, then the neglect may be excusable. The real question in this case is: Must a court always impute counsel's negligence to the client? Even when if we hold that it is not required to in every case. This is where the exercise of the court's discretion comes into play."

Considering Mr. Brown was not a licensed attorney and the fraudulent representations he made, there is no way that his conduct should be imputed upon the Stovall's.

In *Mayor v. WCI Steel, Inc., et al.*, 2001 WL 276976 (Ohio App. 11 Dist) the court stated that under certain

circumstances of egregious conduct on the part of counsel, this court would not rule out the possibility that in the event an attorney had abandoned his client, Civ.R. 60(B)(5) would be applicable. Abandonment would occur if the attorney were prohibited from practicing law by a disciplinary committee, or if the attorney refused to respond to communications from his client and failed to perform any work on behalf of his client, in which case the client would e without scienter. The Court further then said in regard to an attorneys gross 'excusable neglect' that, "The appropriate remedy for such incompetence is a malpractice claim." *Id.* However, Brown's egregious, fraudulent conduct upon the Stovall's has not left the Stovall's with the option of a malpractice claim covered by malpractice insurance covering same as a remedy and thus the appropriate and the only available remedy would be relief from judgment.

Motions pursuant to the fifth ground of Rule 60(B), "any other reason justifying relief from the operation of the judgment," must be brought within a reasonable time and are not limited by the one-year time limit governing the first three grounds under Rule 60(B). Since the Stovall's brought this motion as soon as practically possible upon the ongoing discovery of the fraud perpetrated upon the Court and upon themselves this motion should be considered to have been brought well within a reasonable amount of time.

C. THE STOVALLS ARE ENTITLED TO RELIEF FROM JUDGMENT

The motion is for relief from the July 28, 2000 Judgment of this Court was made pursuant to Civ.R. 60(B)

RELIEF FROM JUDGMENT OR ORDER, which provides in pertinent part as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

Civ.R.60, which governs motions for relief from judgment, is a remedial rule to be liberally construed with a view for effecting a just result so that ends of justice may be served. *Kay v. Marc Glassman, Inc.* (Ohio 1996) 76 Ohio St.3d 18; hat is to be liberally construed. *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections* (Ohio 1993) 67 Ohio St.3d 134, 616 N.E.2d 869; *Wells v. Spirit Fabricating, Ltd.* (Ohio App. 8 Dist. 1996) 113 Ohio App.3d 282, 680 N.E.2d 1046, dismissed, appeal not allowed 77 Ohio St.3d 1514, 674 N.E.2d 369.. And, liberally construed to strike a balance between the ideas that it is desirable to bring an end to litigation and to see justice done. *Brown v. Akron Beacon Journal Publishing Co.* (Summit 1991) 81 Ohio App.3d 135, 610 N.E.2d 507, dismissed, jurisdictional motion overruled 63 Ohio St.3d 1404, 585 N.E.2d 426. Any doubt should be resolved in

favor of the motion so that cases may be decided on the merits. *Moore v. Emmanuel Family Training Center, Inc.* (Ohio 1985) 18 Ohio St.3d 64, 479 N.E.2d 879, 18 O.B.R. 96.

Upon finding that the movant is entitled to relief from prior judgment, the court is ordinarily to vacate or suspend judgment pending trial on the merits of issues raised. *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections* (Ohio 1993) 67 Ohio St.3d 134. In this case, the hearing allowed was very restrictive.

The Stovalls have established (1) there is meritorious defense or claim to present if relief is granted; (2) that movant is entitled to relief under one of grounds stated in the rule; and (3) the motion is made within reasonable time. *Morgan Adhesives Co. v. Sonicor Instrument Corp.* (Summit 1995) 107 Ohio App.3d 327; *S. Ohio Coal Co. v. Kidney* (Meigs 1995) 100 Ohio App.3d 661, appeal not allowed, 72 Ohio St.3d 1530, and their motion for relief from judgment should be granted. As indicated above, all three of these requirements were met.

V. CONCLUSIONS

For the reasons stated, this court should overrule the trial court and enter and order granting the Stovalls' motion for relief from judgment, and remand the case back with an order permitting the Stovalls' a reasonable time to file a brief in opposition to the summary judgment motion by a licensed attorney.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing APPELLANTS' Brief was sent by regular U.S. Mail, postage prepaid, to Chad Murdock, City of Streetsboro, OH, Attorney For Plaintiff-Appellee, City of Streetsboro, and all other named parties on this 23rd day of May, 2002.

/s/ Henry B. Fischer
Henry B. Fischer, Esq.,
Attorney for Defendant-
Appellants RAY STOVALL
& PHYLLIX STOVALL

IN THE SUPREME COURT OF OHIO

CITY OF STREETSBORO Appellees, v. RAY STOVALL & PHYLLIX STOVALL ET AL Appellants.	:	On Appeal from the Portage County Court of Appeals, Eleventh Appellate District Court of Appeals Case No. 2002-P-0018

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS RAY STOVALL & PHYLLIX STOVALL

(Filed Jun. 6, 2003)

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Proposition of Law No. II: A trial court abuses it discretion and errs as a matter of law by denying a motion for relief from a summary judgment where the summary judgment was granted under circumstance where the movants were represented by an imposter engaged in the unauthorized practice of law, fraudulently holding himself out to the movant and courts as an attorney, who incompetently failed to submit affidavits, certifications and other Civ.R.56(C) evidence to support arguments and demonstrate that the City of Streetsboro denied movants who are black persons "equal protection" of the laws by requiring them to obtain a permit for a necessary retaining wall to protect their property from erosion where the City did not require anyone else to secure such a permit and permitted

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case is one of first impression. This case is one of public and great general interest, because without intervention by the Ohio Supreme Court it leaves ordinary Ohio lay citizens and members of the public, Ray Stovall & Phyllix Stovall (the "Stovalls"), who have been substantially damaged by the deception and unauthorized practice of law of an imposter[1] without any meaningful remedy from such damage. First, the Stovalls were denied constitutionally guaranteed "equal protection of the laws" by the City of Streetsboro. Second, the Stovalls were victimized by an imposter who held himself out as an attorney and engaged in the unauthorized practice of law, which precluded them from a proper defense in court, resulting in a failure of the Ohio Courts to enforce their constitutional rights. Third, the Ohio system of justice has imputed the acts constituting the unauthorized practice of law to be imputed to the victims.

It is well known that Courts will contact an attorney to make a correction, e.g., in instances where the wrong Supreme Court Registration Number is inadvertently

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[1] In *Disciplinary Counsel v. Brown*, 99 Ohio St.3d ___, 2003-Ohio-2568 (Case No. 2002-1380, decided May 28, 2003), the Ohio Supreme Court adopted the findings of the Board of Commissioners on the Unauthorized Practice of Law that **Bruce A. Brown**, aka **Bruce Andrew Brown**, was guilty of the unauthorized practice of law and enjoined such conduct in the future. The Stovalls were victimized in this case by the same Mr. Brown, both in the Common Pleas Court and in the Court of Appeals.

given, and from that we know that at least some Ohio courts are taking steps to put a check on the unauthorized practice of law. However, if the decisions below in this case are left standing, then this case demonstrates that the Ohio public is really without adequate remedies and is not adequately protected from the unauthorized practice of law by impostors who hold themselves out as licensed attorneys to purported clients and then use the identity of a truly licensed Ohio attorney, either by means of a forged signature or by the deception of falsely signing the licensed attorney's name as if authorized on papers filed with the court, e.g., "Bruce Bogart/BB, as was done in this case.

STATEMENT OF THE CASE AND FACTS

A. STATEMENT OF CASE

1. Initial Trial Court Case. The City's Complaint (R-0001) for injunctive relief to force the Stovalls to remove a rain garden installed in their rear yard was filed in the trial court on June 24, 1999. Plaintiff's Amended Complaint (R-0011) (R-0026) was Answered by the Stovalls on 12/6/99 (R-0031).

On 4/20/00 **Bruce Andrew Brown** (**the "imposter"**) defrauded the trial court by filing a Notice of Appearance of alleged substitute Counsel *Bruce Bogart* (R-0043) on behalf of the Stovalls. The imposter who filed the Entry of Appearance was not a licensed attorney in the State of Ohio and he did not have permission from Bruce Bogart, who was a licensed attorney at the time, to file any papers in court using and signing his name thereon. The Stovalls

believed the imposter was a duly licensed attorney representing them and they were not aware of what was happening at the time.

The City filed a Summary Judgment Motion (See R-0046 & R-0053) supported by affidavits and certified documents. Imposter Brown filed the Stovall's Opposition to the City's Motion (R-0050), fraudulently representing to the trial court and the Stovalls that it was a document signed by attorney Bruce Bogart or signed with his permission. Further, the imposter submitted the Brief in Opposition with no affidavits or other Civ. R. 56(C) evidence attached in support thereof to raise any issue of material fact and failed to even mention Section 1333.04 of the City's Codified Ordinances which exempted the Stovalls' rain garden installation.

The Trial Court, **only** "*construing the CivR. 56(C) evidence* in favor of the Stovalls" (i.e., only the submissions of the City) gave no consideration to anything submitted on behalf of the Stovalls, because *no* Civ.R.56(C) was offered on their behalf, concluded there were no issues of material fact and granted the City's Motion on 7/28/00 (R-0071, the "7/28/00 Judgment"), ordering an injunction on the Stovalls to remove the wall placed at the back of their property.

2. The 2000 Appeal. Imposter Brown filed a Notice of Appeal (R-0078) on August 15, 2000, which was docketed as Eleventh District Court of Appeals Case No. 2000-P-0089 (the "2000 Appeal") and filed a Brief, *inter alia*, fraudulently representing to the Courts and the Stovalls that all such documents filed were signed by attorney Bruce Bogart or signed with his permission. When the Court of Appeals contacted Bruce Bogart regarding an

address change, he became aware of what was going on and filed a motion to remove his name from the case as counsel of record (See Appendix Page A-25).

Instead of setting the matter for hearing to properly inform the Stovalls of their rights, on *August 22, 2001*, the Court granted Bogart's motion (JR0033, Pg.1087 & See Appendix Page A-) noting at page 2 of the judgment entry that:

> Needless to say, forgery and the illegal practice of law are serious matters, which have criminal implications; accordingly, these matters should be investigated by the appropriate officials in Portage County . . .

and further specifying have two options for the Stovalls: (1) hire a new attorney or (2) let the matter proceed on the briefs filed *pro se* within 20 days. Since, the Stovalls were unable to locate a new attorney before the time expired, the case proceeded as if *pro se* by **default**.

On *September 24, 2001*, the Eleventh Circuit Court of Appeals rendered its decision in the 2000 Appeal (R-0101, 9/24/01 & JR0033, Page 1259; See Appendix Page A-12) upholding the trial court. At pages 5 and 6 of the opinion, this Court of Appeals made clear the basis for its decision, i.e.,. that the Stovalls (i.e., the imposter) did not state specific facts *as required by Civ.R. 56(C)* and no evidence or stipulation may be considered except as stated in this rule.

3. Trial Court Civ.R. 60(B) Motion. Under the circumstances presented, no appeal could be taken to the Ohio Supreme Court. On November 8, 2001, a Motion for Relief from Judgment (R-0102) was filed on behalf of the Stovalls at the trial court, urging for the *first time in the*

record that the Stovalls and the Court had been defrauded and the Stovalls had been denied their day in court, equal protection, due process, etc. This was as soon as possible after the Stovalls secured new Counsel in early October, 2001. **This motion was *supported* by affidavits and certifications, Civ.R.56(C) Evidence** establishing for the first time defenses and material issues of fact by reason of conflicts with the City's affidavits.

On 12/31/2001, at the hearing scheduled on the motion, Defendant Phyllix Stovall testified how the Stovalls and the courts were deceived and defrauded by the non-attorney imposter (Tr-10 et seq; R-0120). She stated that "We knew we had a mound of evidence that wasn't being used and he wasn't supporting the case. We had written affidavits ourselves and had given him the affidavits and he wouldn't use them." (Tr-18, Line 25 et seq.; R-0120). When confronted regarding personally contacting the Court of Appeals: "He (Mr. Brown) told us not to do that, that they – that they wouldn't discuss it with us, we would have to have an attorney. So we started searching for an attorney immediately. (Tr-21, Line 16 et seq.; R-0120). She testified that the Stovalls paid imposter Brown $12,000 for legal services and they had been defrauded, cheated, and deprived of their day in court by him (Tr-24, Line 22 et seq.; R-0120). The Stovalls were unable to locate an attorney to represent them until after October 5, 2001 (Tr-22, line 14; R-0120)

On January 31, 2002, the Trial Court entered judgment denying the Stovalls motion for relief from Judgment (R-0115, Appendix Page A-8) reasoning that "All of the *material* facts alleged now by the Stovalls were alleged in the previous proceeding . . . " The Trial Court gave no consideration to the fact that it had not considered

anything in the previous submission of the Stovalls, because no Civ.R.56(C) was offered on their behalf. This judgment was appealed.

4. **The 2002 Appeal.** After a full briefing and argument, the Court of Appeals entered its judgment and opinion on April 28, 2003, upholding the decision of the trial court. The court held essentially that failure of the Stovalls to secure new counsel within less than 20 days notice imputed all the acts of the imposter to the Stovalls and *res judicata* of the September 22, 2001 Court of Appeals decision barred their motion for relief from judgment.

B. STATEMENT OF FACTS[2]

The home of the Stovalls, black persons, is located at 2082 Deer Crossing in the Deer Meadow Subdivision, City of Streetsboro, County of Portage, and State of Ohio. It was built in 1996 pursuant to a building permit along with other homes in accordance with drainage plans approved y the City. From the start, the Stovalls encountered excessive erosion and gullies, especially in their rear yard. They communicated *inter alia* with the Drees Company, the City, the neighborhood association, the Ohio EPA ("OEPA"), and the Portage Soil and Water Conservation District ("PSWCD") to get corrective action without any success. PSWCD recommended gardening, in particular installation of a bioretention structure commonly referred

[2] All of the facts stated herein were verified by affidavits or contained in certified documents submitted to the Trial Court on November 8, 2001 with the Stovalls' motion for relief from judgment.

to as a "rain garden" to arrest and control the Stovalls' chronic erosion problem. This entailed installation of a "V" shaped retraining wall oriented and located with the large opening of the wall at the top of the rear slope pointing downward and filled with top soil and plantings in and around the wall to act as a retention device to slow down the rate of flowing water during a storm to the point that erosion and flooding are substantially reduced or eliminated.

In August, 1998, the Stovalls went to the Streetsboro Building Department with their plans for the "rain garden" and requested a permit. They were *informed* by Michael August, Interim Building Director, and Mary Ann Howitt, Building Department Records Custodian that *they did not need any permits for installation of their planned rain garden thereby granting the Stovalls permission to install such rain garden including a retaining wall as a part thereof.* The Stovalls proceeded with installation of the rain garden. But, the City soon shut down work on the rain garden, claiming that a permit was in fact needed. When the Stovalls returned to request a permit on 12/7/98, they overheard City Director Dan Gargas tell Mike Freedburg that he would not grant any permit to the Stovall's property under any circumstances.

At the 12/21/98 Council Meeting, Streetsboro **Mayor Henzel**, referring to Appellant Phylix Stovall, **stated** that

> **" . . . this is the lady that came to the Building Dept. and was told it was ok to put up a wall. A Retaining Wall that we have no documentation or laws governing it. So she went ahead and did it and now there's a problem."**

Gary Cross then stated: "And Mary Ann and Mike concur that that's what they would have told them." These are excerpts transcribed from a certified copy of the tape recording of the December 21, 1998 meeting. (See R-0103, Exhibit J-1, Addendum to Exhibit appendix filed 11/13/01). See also Certified Minutes at Page 9 quoting: Mayor Henzel (See Exhibit "J" of Exhibit Appendix to Motion, R-0102).

At a meeting with the Building Department on 4/9/99, Mike August admitted that he gave the Stovalls permission to erect the retaining wall. (See affidavit of Jerry Coulbourne and Affidavits of Phyllix & Ray Stovall, Exhibits "A", "B", and "C" of Attached Exhibit Appendix. to Motion for Relief from Judgment, R-0102).

Section 1333.04 of the Codified Ordinances clearly exempted the Stovalls' bioretention rain garden from Permit Requirements as did Section 901.04, providing that no permit shall be required for excavation, grading, or filling operations including gardening.

Phyllix Stovall made record checks for building permits at the Building Department re numerous (approximately 37) similarly situated retaining walls she noted were erected in the surrounding residential area including those the same or higher than the one installed in her yard. She was advised that there were and are no such permits issued for any of them including some erected both before and after the Stovalls were cited. She further found that every property owner of each of the 35 addresses noted was Caucasian creating an inference of discrimination against the Stovalls by reason of race.

In April, 2000, the Stovalls needed an attorney to represent them, since their first attorney desired to withdraw, and a business client referred them to attorney Bruce A. Brown. They met him at what appeared to them to be a large law firm occupying the thirteenth floor of the Bank One Building in downtown Cleveland, Ohio. They asked the receptionist for Mr. Brown and met with him in a conference room. Mr. Brown assured them he could obtain favorable results for them and that told them that he was licensed to practice in Ohio and New York.

When the Stovall's noticed that the first court documents filed on their behalf by Brown bore the name of attorney Bruce P. Bogart, they questioned Brown and he informed them that Bogart was his partner and further that Bogart was much more influential in Portage County than he and could likely obtain favorable results more easily. Although the Stovall's never met Bruce Bogart face to face, on several occasions they spoke to a person who said he was Bruce P. Bogart on conference calls with Bruce A. Brown originating from his office.

Throughout the case, the Stovall's presented evidence to Bruce A. Brown for use in their case. When the Stovall's questioned why he did not use affidavits and evidence they presented, he repeatedly told them it was not necessary, assuring them that it was a very simple case that he already had won. He stated that he was the attorney and knew what he was doing.

Imposter Brown lost the Stovall's case at the trial level because he incompetently failed to submit any Civ.R. 56(C) evidence and the case and defenses of the Stovalls never properly came before the trial or appeals Court.

After Bruce Bogart filed his motion to be removed as counsel of record and the Court of Appeals granted it on August 22, 2001, the Stovalls were notified for the first time that Bruce P. Bogart never represented them, that their appellant brief possibly "was a forged document which was not written by a licensed attorney", and that the averments of Mr. Bogart's motion "also support the inference that the brief was the product of an illegal practice of law." When confronted by the Stovalls, Bruce A. Brown unrelentingly attempted to continue his fraud upon the Stovalls. He assured the Stovall's that there was a case of mistaken identity with Bruce E. Brown and showed the Stovall's documentation relating to the disbarment of a Bruce E. Brown. He insisted that it was part of an ongoing harassment created by the City, that it was not materially relevant to the case, that they could say they were pro se to avoid the argument, and it would be no use for them to contact the court of appeals, because they would not listen to anyone without an attorney. The Stovalls began seeking new counsel, but time ran out for exercising their options; the less than 20 days afforded was not enough time.

When the Stovalls contacted the undersigned in early October, 2001, e-mail checks were made with the Ohio Supreme Court confirming that: (1) Bruce P. Bogart was licensed to practice law during the pendency of this action until September 1, 2001, and (2) Bruce A. Brown was never licensed to practice in the State of Ohio, and that a Bruce E. Brown, a different person, but the only "Bruce Brown" ever licensed, was disbarred in 1999 (See *Office of Disciplinary Counsel v. Brown*, (1999) 87 Ohio St.3d 316). To the shock of the Stovall's, we found the case of *State of Ohio v. Brown*, (8th App Dist., 1995), 108 Ohio App.3d

489, (discretionary appeal denied 664 N.E.2d 536 May 15, 1996), affirming conviction of Bruce A. Brown of 44 felony charges in connection with his holding himself out to be a licensed attorney, despite disbarment in New York and never being licensed to practice in Ohio.[3]

To that time, the Stovalls had believed that Mr. Brown was an attorney and they were devastated to learn how he had lied to them, fooled them all this time, committed a fraud against them and the courts, and his incompetence in not properly submitting their defense.

The Stovalls' motion for relief from judgment pursuant to Civ.R.60(B) was filed on November 8, 2001, within about one month from the time the undersigned Counsel had their first meeting with the Stovalls and they realized that Bruce A. Brown was not a lawyer.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The incompetent acts of an imposter, who misrepresents himself as an attorney to a purported client to become so engaged for financial gain, filing notices, motions, and other court papers using the name of a duly licensed Ohio attorney by means of forgery or other fraud upon the trial and appeals courts should not be imputed to the client as a valid reason for barring the granting of a motion for relief from summary judgment.

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[3] Ironically, one of the grounds for appeal by Bruce A. Brown who was *pro se* in his criminal case, was regarding the Court ruling of not allowing admittance of an unauthenticated document as evidence.

The basis for the Court of Appeals decision upholding the trial court is set forth at page 5 of the opinion, to wit:

> While the issues raised by appellants' original trial counsel may not have been presented at the same level of competence as appellants' present counsel, the fact remains that the same issues and underlying facts were raised and ruled upon by both this court and the court below. Additionally, this court also gave appellants the chance to obtain new counsel before proceeding with their first appeal. Appellants chose to proceed pro se in that appeal and lost. *Appellants do not get a second chance.*

But, under the circumstances of this case, **the appellants never really had a first chance**. They were sued and have not yet had their day in court on the merits represented by a licensed attorney. Without conducting a hearing so that the Stovalls could be properly informed of what was taking place and what their rights were, the Court of Appeals arbitrarily ordered that the Stovalls have a new attorney make an appearance in the case within less than twenty days or the Court was going to decide the case on the Brief fraudulently and incompetently filed by the imposter thereby imputing everything the imposter did to the Stovalls. (See Appendix A-23 & 24). This was not enough time for the Stovalls to secure new counsel. This was not fair or reasonable.

We have found no cases directly on point. But, it is well established in Ohio by the Supreme Court decision in *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, that an attorney's actions are generally imputed to the Client. There are exceptions to this rule however. In *Scott v. Taps Lounge, Inc.*, 1991 WL

179439 (Ohio App. 4 Dist.), the Court found that in a case where an attorney completely abandoned a client that this action should not be imputed to the client and relief should be granted by 60(B)(5),

> "If counsel is negligent or dilatory and that negligence is imputed to the client, then there is no excusable neglect. But if the court in its discretion, based on the facts before it, decides not to make that imputation, then the neglect may be excusable. The real question in this case is: Must a court always impute counsel's negligence to the client? Even when if we hold that it is not required to in every case. This is where the exercise of the court's discretion comes into play."

Considering Mr. Brown was not a licensed attorney and the fraudulent representations he made, there is no way that his conduct should be imputed upon the Stovalls.

In *Mayor v. WCI Steel, Inc., et al.*, 2001 WL 276976 (Ohio App. 11 Dist) the court stated that under certain circumstances of egregious conduct on the part of counsel, this court would not rule out the possibility that in the event an attorney had abandoned his client, Civ.R. 60(B)(5) would be applicable. Abandonment would occur if the attorney were prohibited from practicing law by a disciplinary committee, or if the attorney refused to respond to communications from his client and failed to perform any work on behalf of his client, in which case the client would be without scienter. The Court further then said in regard to an attorneys gross 'excusable neglect' that, "The appropriate remedy for such incompetence is a malpractice claim." *Id.*

However, Brown's egregious, fraudulent conduct upon the Stovalls and the courts has not left the Stovalls with

the option of a malpractice claim covered by malpractice insurance. Thus the appropriate and the only available remedy is relief from the judgment caused by the fraud.

> **Proposition of Law No. II:** A trial court abuses its discretion and errs as a matter of law in denying a motion for relief from summary judgment where that summary judgment was granted because the movants were represented by an imposter engaged in the unauthorized practice of law who fraudulently held himself out to the movant and courts as an attorney and incompetently failed to submit affidavits, certifications and other Civ.R.56(C) evidence in opposition to the summary judgment motion that would have supported defenses including the City's denial of movants (black persons) "equal protection" of the laws by requiring them to obtain a permit for installing a retaining wall that was not required of anyone else while permitting numerous other white property owners to erect similarly situated walls of similar or greater sizes, before and after the movants constructed their rain garden wall, when the motion for relief from judgment was supported with Civ.R. 56(C) evidence sufficient to support said defenses and demonstrate issues of material fact.

The Stovalls have a meritorious defense to present, if given the opportunity. In the January 31, 2002 Judgment Entry (R-0114) the Trial Court stated as its reasons for denying the Motion for Relief from Judgment that:

> In filing their motion and at hearing the Stovalls offer nothing new in the way of a meritorious defense to this judgment. All the *material* facts alleged now by the Stovalls were alleged in the previous proceedings in this Court and to the

> Court of Appeals. None of these facts present a meritorious defense to the claim sought to be vacated.

But, this a *non sequitur* and clearly incorrect, because in ruling on Plaintiff's Summary Judgment Motion (R-0071) the Trial Court in its judgment entry (R-0071) made it crystal clear that it was not considering facts, arguments, and defenses not supported by Civ.R.56(C) evidence, to wit:

> The **Civ.R. 56(C) evidence** submitted shows that the Stovalls constructed a retaining wall at the rear of their property without the necessary grading and building permits . . . Upon review . . . and construing the **Civ.R. 56(C) evidence** in favor of the Stovalls, the Court concludes that Streetsboro is entitled to judgment as a matter of law.

The trial court did not consider and made no mention of the Stovalls' denial of equal protection argument, because no Civ.R. 56(C) evidence was submitted by the imposter to support such argument.

The affidavits, certifications, and other Civ.R. 56(C) evidence submitted with the Stovalls' motion for relief from judgment countered virtually every assertion made by the City with their motion for summary judgment. Material issues of fact as defined by Civ. R. 56 were demonstrated. The Stovalls made public records requests and found that no other permits of the type required of them had ever been issued, that 37 other parties were allowed to do what the Stovalls did, before and after they did it, without securing a permit. This is set forth in their affidavits. Where the laws of a city requires one person to get a permit, but no one else similarly situated had to get

a permit before or after the city so requires it, there is *prima facie* a denial of equal protection.

Furthermore, new facts were stated, e.g., the impact of Codified Ordinances Section 1333.04, which was never cited, argued, considered, or even mentioned by anyone in any document filed in the Trial Court or Court of Appeals until 11/8/01 in the Stovalls' Motion (R-0102). The rain garden retaining wall is not in the nature of a fence wall for which a permit is required. Section 1333.04, Permit Exceptions, of the City's Code provides that "No permit shall be required for the following classes of excavation, grading, or filling operations . . . (d) . . . farming, gardening or similar agricultural use . . . (e) . . . raised flower beds . . . Landscaping, including mounds . . . (4) Other items as determined by the Building Director. The rain garden retaining wall slows down drainage to reduce erosion, but does not alter the drainage pattern.

Clearly, the Trial Court did not consider and rule on the Stovall arguments before, because they were not before the court supported by Civ. R. 56(C) evidence. Now when the facts are asserted by affidavits and certifications and a code section not previously considered is brought to the court's attention, it is untenable that the Trial Court summarily holds with no explanation that none of the supported facts present a "meritorious defense to the claim sought to be vacated."

Civ.R.60, which governs motions for relief from judgment, is a remedial rule to be liberally construed with a view for effecting a just result so that ends of justice may be served. *Kay v. Marc Glassman, Inc.* (Ohio 1996) 76 Ohio St.3d 18; that is to be liberally construed. *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of*

Elections (Ohio 1993) 67 Ohio St.3d 134, 616 N.E.2d 869; *Wells v. Spirit Fabricating, Ltd.* (Ohio App. 8 Dist. 1996) 113 Ohio App.3d 282, 680 N.E.2d 1046, dismissed, appeal not allowed 77 Ohio St.3d 1514, 674 N.E.2d 369 and, liberally construed to strike a balance between the ideas that it is desirable to bring an end to litigation and to see justice done. *Brown v. Akron Beacon Journal Publishing Co.* (Summit 1991) 81 Ohio App.3d 135, 610 N.E.2d 507, dismissed, jurisdictional motion overruled 63 Ohio St.3d 1404, 585 N.E.2d 426. Any doubt should be resolved in favor of the motion so that cases may be decided on the merits. *Moore v. Emmanuel Family Training Center, Inc.* (Ohio 1985) 18 Ohio St.3d 64, 479 N.E.2d 879, 18 O.B.R. 96.

The Stovalls established (1) there is a meritorious defense or claim to present if relief is granted; (2) that movant is entitled to relief under one of grounds stated in the rule; and (3) the motion is made within reasonable time. *Morgan Adhesives Co. v. Sonicor Instrument Corp.* (Summit 1995) 107 Ohio App.3d 327; *S. Ohio Coal Co. v. Kidney* (Meigs 1995) 100 Ohio App.3d 661, appeal not allowed, 72 Ohio St.3d 1530. Their motion for relief should be granted.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court grant jurisdiction and allow this case to be heard so that the important issues presented in this case will be reviewed on the merits.

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PROOF OF SERVICE

I certify that a copy of this Memorandum In Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellees, Chad Murdock (RN0055322), City of Streetsboro Law Director, 9184 SR 43, Streetsboro, OH 44241 and all other named parties or their Counsel[4] on June 4, 2003.

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(2)

No. 03-851

Supreme Court, U.S.
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In The

Supreme Court of the United States

RAY STOVALL and PHYLLIX STOVALL,

Petitioners,

v.

CITY OF STREETSBORO,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio, Portage County

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a state supreme court not reviewing and voiding a summary judgment that was obtained with the participation of a non-attorney, which judgment was affirmed on appeal and not vacated under a subsequent Civil Rule 60(B) decision, which decision was also affirmed on appeal, violate the Due Process Clause or the First Amendment?[1]

[1] Petitioners frame the question "Whether the refusal of the state supreme court to review and set aside a judgment in favor of the City that disposed of the Petitioners' discrimination-based defense of the City's claim was a violation of the Due Process Clause or the First Amendment right to petition for a redress of grievances where, unknown to the Petitioners, they were represented in the case by an individual who was not a licensed attorney, but a fraudulent imposter who had been convicted of 44 felony counts of unauthorized practice of law?"

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STATEMENT OF THE CASE

Respondent City of Streetsboro (the "City"), under the authority of its ordinances adopted pursuant to the Ohio Constitution, requires any homeowner constructing a retaining wall that exceeds four feet in height to first obtain a City building permit and a grade and fill permit. The permits are required to verify compliance with basic safety regulations. In August 1998, Petitioners Ray and Phyllix Stovall (the "Stovalls") began constructing a six-foot high retaining wall on their residential lot located within the City without such permits. The City filed an action in the Common Pleas Court, Portage County, Ohio (Case No. 99CV532), seeking to enjoin the construction. The Stovalls defended by arguing selective enforcement and that they were initially told by a City official that they did not need permits. On July 28, 2000, the Common Pleas Court entered summary judgment for the City and against the Stovalls, finding that construction of the retaining wall required City permits and ordering the Stovalls to remove the wall (the "Judgment"). Pet., App. at 10.[2] The Stovalls appealed to the Eleventh District Court of Appeals, Portage County, Ohio (Case No. 2000-P-0089).

Soon after filing the appeal, it came to light that a non-attorney had represented the Stovalls in the Common Pleas Court. To remedy the situation, the Court of Appeals gave the Stovalls the choice of either hiring an attorney or proceeding with their appeal *pro se*; a choice all litigates face. The Court of Appeals gave the Stovalls 20 days to

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[2] Reference is made throughout this brief to the Petition for Writ of Certiorari and the Appendix attached thereto.

decide, stating that if they did not file any new submission (their appellant brief had already been filed) within that time, it would assume that they chose to proceed *pro se*. The Stovalls did not file any new submission, so the Court of Appeals considered their appeal *pro se*. The Court of Appeals affirmed the Judgment, finding that the retaining wall was a "structure" that required a building permit and that its construction involved grading and filling that required a grade and fill permit. Pet., App. at 13, 16.

Thereafter, the Stovalls hired an attorney and filed an Ohio Civil Rule 60(B) motion for relief from the Judgment in the Common Pleas Court, arguing that the non-attorney caused them to lose on summary judgment and submitting the evidence they contend should have been submitted on their behalf in the summary judgment proceedings. On January 31, 2002, the Common Pleas Court overruled the motion, finding that the Stovalls did not present any new facts to warrant vacating the Judgment. Pet., App. at 8, 9. The Stovalls once again appealed to the Court of Appeals (Case No. 2002-P-0018), who affirmed the decision. Pet., App. at 1. The Stovalls then appealed to the Ohio Supreme Court (Case No. 03-1008), which denied review on September 10, 2003. Pet., App. at 27. This Petition for Writ of Certiorari was filed on December 10, 2003.

SUMMARY OF ARGUMENT

The thrust of the Stovalls' Petition for Writ of Certiorari is that because they were represented by a non-attorney during the summary judgment proceedings in the Common Pleas Court, the Judgment, which was the result of those proceedings, was void *ab initio* and could not be

cured by subsequent proceedings. Therefore, they reason, by denying review, the Ohio Supreme Court denied them of their federal rights. Assuming that not voiding a judgment obtained with the participation of a non-attorney raises a federal question, such question is being raised for the first time here. The question of whether the Judgment is void was not addressed by or presented to the Ohio Supreme Court, the Court of Appeals, or the Common Pleas Court.

Nevertheless, the City maintains that any harm that might have occurred as a result of the non-attorney's participation in the Judgment was remedied by the Court of Appeals when it gave the Stovalls the opportunity to hire new counsel (to address any perceived error); and their rights were protected *first* by the Court of Appeals' *de novo* review of the Judgment; *second* by their subsequent Civil Rule 60(B) motion; *third* by the Court of Appeals' review of the decision overruling such motion; and *fourth* by the Ohio Supreme Court's review of their Memorandum in Support of Jurisdiction.

Importantly, the Stovalls do not contend that the Ohio courts applied the wrong law or standard of review during the summary judgment or Civil Rule 60(B) proceedings. Rather, they simply do not like that the facts, when applied to such law, do not warrant vacating (or voiding) the Judgment.

Finally, the Stovalls erroneously assert that the Judgment, being not void *ab initio*, is in conflict with a few state appellate cases. However, the cases cited are either distinguishable on the facts or simply do not present a conflict.

REASONS FOR DENYING REVIEW

I. THE STOVALLS' CONTENTION THAT THE JUDGMENT IS VOID WAS NOT ADDRESSED BY OR PRESENTED TO THE OHIO SUPREME COURT

The Stovalls contend that federal law requires that the Judgment is void, and not merely voidable, and argue that, by not voiding the Judgment, the Ohio Supreme Court acted contrary to federal law. But the Stovalls did not present this argument to the Ohio Supreme Court, the Court of Appeals, or the Common Pleas Court. Rather, to the contrary, by filing an Ohio Civil Rule 60(B) motion, the Stovalls argued that the Judgment was *voidable*. Because unlike Federal Rule of Civil Procedure 60(b), Ohio Civil Rule 60(B) does not provide for vacation of a *void* judgment. *Patton v. Diemer*, 35 Ohio St.3d 68, 70, 518 N.E.2d 941 (1988).

With very rare exceptions, this Court has adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision the Court has been asked to review. *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997). The Stovalls did not satisfy this rule, nor did they reference the record with respect to such "federal question" as required under Supreme Court Rule 14(1)(g)(i). For these reasons alone, review should be denied.

II. THE STOVALLS WERE NOT DENIED DUE PROCESS OR AN OPPORTUNITY TO PETITION TO REDRESS GRIEVANCES

When presented with the non-attorney issue, the Court of Appeals provided that the Stovalls could either hire new counsel or proceed *pro se*. Pet., App. at 21. Thus, the Stovalls had an opportunity to be heard on whether they believed the non-attorney had caused them harm, and they had an opportunity to supplement their appellant brief. It is telling that at that time – with the matter of having been represented by a non-attorney clearly before them – the Stovalls did not hire new counsel but chose, through their inaction, to proceed *pro se*. It was only *after* the Court of Appeals affirmed the Judgment that they sought the need to hire an attorney. Under the circumstances, the Stovalls should not now be heard to complain that the Judgment violates their rights.

Further, the Court of Appeals reviewed the summary judgment proceedings *de novo*, applying the same Ohio Civil Rule 56 law as applied in the Common Pleas Court. Pet., App. at 15, citing *Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau*, 88 Ohio St.3d 292, 725 N.E.2d 646 (2000), and *State ex rel. Morley v. Lordi*, 72 Ohio St.3d 510, 651 N.E.2d 937 (1995). In other words, the evidence submitted in the Common Pleas Court was reviewed by the Court of Appeals, and showed that there was no genuine issue and that reasonable minds could come to but one conclusion: Constructing a six-foot high concrete slab wall required City permits. Pet., App. at 16. The Judgment was affirmed.

Thereafter, instead of appealing to the Ohio Supreme Court arguing that the Judgment was void, as they contend here, the Stovalls filed a Civil Rule 60(B) motion for

relief from the Judgment in the Common Pleas Court. Pet., App. at 41. Since the purpose of Civil Rule 60(B) is remedial in nature, to be liberally construed so that ends of justice may be served, *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996), a substantial error in the Judgment caused by the non-attorney could be cured by vacating the Judgment. Thus, the Judgment was subjected to further scrutiny under a process that afforded the Stovalls yet another opportunity to be heard and to redress before the court who rendered the Judgment any errors therein.

In *Link v. Wabash Railroad Company*, 370 U.S. 626, 632, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), a federal trial court dismissed an action with prejudice for failure to prosecute, without notice to the plaintiff. On appeal, the plaintiff argued that the trial court violated his due process rights. This Court did not agree. This Court further stated that "the availability of a corrective remedy such as is provided by Federal Rule of Civil Procedure 60(b) . . . renders that lack of prior notice of less consequence. Petitioner never sought to avail himself of the escape hatch provided by Rule 60(b)." *Id.* at 632. If the *availability* of a Civil Rule 60(b) motion renders a due process issue of "less consequence" – where no opportunity to be heard was afforded – then clearly the *use* of such a process renders the due process issue here of little or no consequence.

The Common Pleas Court overruled the Civil Rule 60(B) motion, finding that the Stovalls did not offer any new facts to warrant vacating the Judgment. Pet., App. at 8, 9. The Stovalls appealed to the Court of Appeals, who affirmed the decision. The Court of Appeals stated that the Stovalls "are attempting to get another opportunity to

argue the same facts and issues already brought before both the trial court and this court." Pet., App. at 4. It further stated that the affidavits contained in their "motion to vacate simply restate the facts as contained in [their] summary judgment motion from the original action, thus failing to provide any new evidence." Pet., App. at 5.

With these proceedings before it, the Ohio Supreme Court correctly recognized that the Stovalls were not denied any federal rights. Its decision to deny review is sound and need not be reviewed here.

III. THE CASES CITED BY THE STOVALLS DO NOT CONFLICT WITH THE OHIO SUPREME COURT'S ENTRY DENYING REVIEW

The Stovalls contend that the Ohio Supreme Court's entry denying review conflicts with (A) other unnamed states on issues of due process and the right to petition for redress of grievances, Pet. at 12; and (B) a purported legal principle in Ohio and other states that a judgment obtained with the participation of a non-attorney is void. Pet. at 15. Though the Ohio Supreme Court's entry denying review was not a decision on the merits, so it could not be conflicting with a decision on the merits, nevertheless, these contentions are not supported by the cases cited by the Stovalls.

(A) The entry denying review is consistent with the due process and redress cases cited

Under this contention, and without any reference to the facts, the Stovalls cite several cases of this Court that stand for the proposition that due process and the right to access to the courts are fundamental. The Stovalls do not

examine how the process afforded them denied them of these rights; or how the Ohio Supreme Court denied them such rights. Rather, as throughout these proceedings, the Stovalls engage in the practice of ignoring the facts by concluding that they have been denied their rights.

The Ohio courts have protected the Stovalls' rights, consistent with the holdings of this Court. Therefore, the Ohio Supreme Court's decision to deny review is sound and need not be reviewed here.

(B) The entry denying review is consistent with the other cases cited

The Stovalls cite *Alliance Group, Inc. v. Rosenfield*, Pet. at 15, an Ohio appellate case, for the proposition that a judgment obtained with the participation of a non-attorney is void. The case does not stand for such proposition. Rather, *Rosenfield* involved the filing of a complaint by a non-attorney corporate agent. The only pleading the Stovalls filed in this case was their answer to the complaint, which was filed by an Ohio attorney. The Stovalls then cite *Russell v. Dopp*, Pet. at 15, a California appellate case, and *State ex rel. Mather v. Carnes*, Pet. at 15, for the same proposition. *Carnes* involved a non-attorney filing a motion to quash, which violated a local rule rendering service on the motion a nullity, and does not stand for the stated proposition.

The peculiar facts in *Dopp* did lead that court to find that a judgment obtained with the participation of a non-attorney was irregular, under a California rule of civil procedure, and should be reversed (unless Dopp knowingly hired the non-attorney). *Russell v. Dopp*, 36 Cal. App. 4th

765, 780 (1995). In *Dopp*, defendant Dopp hired an attorney to represent her but that attorney's father, a non-attorney, represented her at trial. The matter came to light while the jury was deliberating. The trial court immediately removed the non-attorney from the case but allowed the jury to further deliberate and render a verdict, which was against Dopp. Dopp then hired another attorney who filed a motion for new trial under California's code of civil procedure, arguing that because she had been represented by a non-attorney the trial was irregular.

The facts here are far different than those in *Dopp*. Here the non-attorney filed, and responded to, a motion for summary judgment. Unlike a jury trial, a motion for summary judgment turns on the evidence; persuasive argument and witness credibility are not to be considered. Further, unlike a jury trial, in Ohio, summary judgment proceedings are reviewed *de novo* on appeal, applying the same law applied in the lower court. Indeed, unlike the jury verdict in *Dopp*, the Judgment was reviewed *de novo* by the Court of Appeals (after the Stovalls had an opportunity to hire new counsel), and was scrutinized further under the Civil Rule 60(B) proceedings and appeal. Clearly, being represented by a non-attorney in a jury trial raises more due process issues than a non-attorney filing a complaint or motion.

However, the law applied here – that a judgment is voidable under the rules of civil procedure – is similar to the law applied in *Dopp*. Ohio Civil Rule 60(B), as the civil rule applied in *Dopp*, allows relief from a judgment if the applicant can satisfy the rule. The Stovalls were not able to satisfy the rule. The Common Pleas Court and Court of Appeals both found that the Stovalls failed to show that they had a meritorious defense to present should relief

from the Judgment be granted. Pet. at 8-9; Pet. at 5. The Ohio Supreme Court did not see the need for further review.

Finally, Supreme Court Rule 10(b) provides that a reason to grant a petition for writ of certiorari is that a state court of last resort has decided a federal question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeals. The cases cited by the Stovalls are *not* from state courts of last resort. Although not exclusive, Rule 10(b) suggests that such decisions are less important in determining whether a reviewable conflict exists. This shortcoming, combined with this Court being asked to review a decision that is not on the merits, is another reason why review should be denied.

IV. THE STOVALLS MAKE SEVERAL MISSTATEMENTS OF FACT

In their Statement of the Case, the Stovalls make several misstatements of fact, which the City points out in accordance with Supreme Court Rule 15(2).

First, the Stovalls euphemistically refer to their retaining wall as a "botanical rain garden" when, in fact, it is constructed of concrete slabs (about 2' high x 3' wide x 4' long) put in place by a machine and stacked six-feet high. When viewed in this light, it becomes clear that the structure requires a building permit.

Second, the Stovalls state that they "were told that no permit was needed for the rain garden facility and so

proceeded to install it." Pet. at 4. This statement contradicts the Court of Appeals findings in reviewing the Judgment *de novo*. Pet., App. at 18.

Third, the Stovalls state "that retaining walls of similar heights to the rain garden had been and were being installed by over 42 white residents without the issuance of any permits and that the City was taking no action against them . . . " Pet., at 4. The issue raised by this allegation has already been decided. The Court of Appeals twice, first in its *de novo* review of the Judgment, and again in its review of the decision overruling the Civil Rule 60(B) motion, found that the Stovalls did not prove selective enforcement or discrimination. Pet. at 15, 18; Pet. at 5.

Fourth, the Stovalls contend that the non-attorney did not file any Ohio Civil Rule 56(C) quality evidence. Pet. at 5. This statement is incorrect. The non-attorney did file affidavits with the Stovalls' motion for summary judgment, which the Court of Appeals found were substantially similar to the affidavits filed with their Civil Rule 60(B) motion. Pet. at 5.

Fifth, the Stovalls contend that giving them only 20 days to decide whether to hire an attorney or proceed *pro se* was not enough time. Pet. at 6. However, the Stovalls hired their present attorneys within about 12 days after the Court of Appeals affirmed the Judgment (and their attorneys promptly filed the Civil Rule 60(B) motion).

Sixth, the Stovalls list eight things that the Common Pleas Court "knew" when they filed their Civil Rule 60(B) motion that are not entirely correct. Pet. at 7-8. Item (1), that the Stovalls had not been deprived of due process or their day in court, is argument and not fact. Item (2), the

non-attorney *did* submit affidavits with the Stovalls' motion for summary judgment. Items (3) and (4) are speculative at best. The affidavits submitted with the Stovalls' Civil Rule 60(B) motion, which were substantially the same as those attached to their motion for summary judgment, did not represent a meritorious defense to the claim that the Stovalls were required to first obtain City permits. Item (5), see the second response to misstatements of fact above. Items (6) and (7) intimates that the City "reversed" itself because the Stovalls are black persons and "likely" denied them equal protection. The City has not discriminated against the Stovalls. See the third response to misstatements of fact above. Finally, if Item (8) is true, then the Stovalls would be entitled to a City grade and fill permit, which, along with the building permit, they have never applied for.

CONCLUSION

The City respectfully requests that the Petition for Writ of Certiorari be denied.

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